FILED
AUG 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants.*

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees.*

On Appeal From the Supreme Court of the State of Alaska

JURISDICTIONAL STATEMENT

ROBERT H. WAGSTAFF
WAGSTAFF & MIDDLETON
500 L Street
Anchorage, Alaska 99501
Counsel for Appellants

Of Counsel:

LEE S. GLASS
JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A SUBSTANTIAL QUESTION IS PRESENTED 6

A. The McCready v. Virginia Ownership Exception to the Privileges and Immunities of Citizenship Needs Limiting Clarification If Not Overruling 6

B. A Special Public Interest Does Not Justify Alaska Hire or Abridgement of the Privileges and Immunities of Citizenship 15

CONCLUSION 20

APPENDIX:

I Opinion of The Supreme Court of the State of Alaska 1a

II Chapter 40 of Title 38, Alaska Statutes 31a

III Chapter 35 of Title 8, Alaska Administrative Code 38a

TABLE OF CASES AND AUTHORITIES

CASES: Page

C.D.R. Enterprises, Ltd. v. *Board of Education, City of New York, et al.*, 412 F.Supp. 1164 (1976), *affirmed* —— U.S. ——, 97 S.Ct. 721 (1977) 18

Corfield v. *Coryell*, 6 F.Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823) 8, 12

Douglas v. *Seacoast Products Inc.*, 45 L.W. 4488 (1977) 11

Edwards v. *California*, 314 U.S. 160 (1941) 15,19

Foster Fountain Packing Company v. *Haydel*, 278 U.S. 1 (1928) 15

Graham v. *Richardson*, 403 U.S. 365 (1971) 16,17, 18

McCready v. *Virginia*, 94 U.S. 391 (1877) 6, 7

Oklahoma v. *Kansas Natural Gas*, 221 U.S. 229 (1911) 13-14

Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923) .. 14

Takahashi v. *California Fish and Game Commission*, 334 U.S. 410 (1948) 15, 17

Toomer v. *Witsell*, 344 U.S. 385 (1948) 16

ALASKA STATUTORY PROVISIONS:

Alaska Statutes 38.40.090(3) 2

8 AAC 35.080 5

UNITED STATES STATUTORY PROVISION:

Alaska Natural Gas Transportation Act of 1976, 15 USC 719 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants.*

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees.*

On Appeal From the Supreme Court of the State of Alaska

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and opinion of the Supreme Court of the State of Alaska, as announced on June 3, 1977, and formally entered on June

13, 1977, upholding the constitutional validity of a state law giving Alaska residents employment preference in substantially all oil and gas related employment in Alaska. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented meriting plenary consideration.

OPINION BELOW

The opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on June 13, 1977. Notice of appeal and this jurisdictional statement were filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1257(2).

QUESTION PRESENTED

May the State of Alaska require private employers involved in any oil and gas activities resulting from leases with the State to first hire and last fire Alaska residents in preference to the residents of the other states?

STATUTORY PROVISIONS INVOLVED

Chapter 40, Title 38, Alaska Statutes entitled "Local Hire Under State Leases" (Alaska Hire) is set forth in Appendix II.

The 1976 Alaska Legislature amended paragraph 1 of AS 38.40.090(3) to read:

> (a) Except for brief intervals, military service, attendance at an educational or training institution, or for absence for good cause, is physically present in the State for a period of one year immediately before the time his status is determined.

Administrative Regulations have been adopted by the Alaska Department of Labor to implement Alaska Hire. They are set forth in Appendix III.

STATEMENT OF THE CASE

The Supreme Court of Alaska divided 3 to 2 on the privileges and immunities question here presented. The forty-one page opinion and dissent of that Court, Appendix A, sets forth the factual record below, the statutory scheme of Alaska Hire involved, and the privileges and immunities question presented under the Constitution of the United States. Appellants' position is cogently set forth in the dissent by Chief Justice Boochever with whom former Chief Justice Rabinowitz joined.

The majority described the case:

> This case considers the constitutionality of the 'Alaska Hire' law, AS 38.40. 'Alaska Hire', enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to non-residents.

Op. p. 2. With regard to the breadth of Alaska Hire, footnote 1 observes that:

> The number of jobs covered by the law varies with the number and size of petroleum and pipe-

line projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.

Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. See AS 38.40.050(a).[1]

But the dissenting Justices noted the direct impact of Alaska Hire is broader yet:

---

[1] The transportation system for Alaska natural gas must be approved by President Carter not later than September 1, 1977. At least a significant portion will be constructed in Alaska. *See* Alaska Natural Gas Transportation Act of 1976, 15 USC 719.

The national interest in Alaska natural gas is described in the Act:

§ 719. Congressional findings.

The Congress finds and declares that—

(1) a natural gas supply shortage exists in the contiguous States of the United States;

(2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;

(3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and

(4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system.

> Only if qualified Alaska residents are unavailable, may others be employed. *The provisions of the act apply also to all employment which is the result of oil and gas leases,* easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases. (emphasis supplied).

Op. p. 32.

Alaska Hire in fact applies even to the work of "suppliers" on non-state owned lands. *See* Appendix III. 8 AAC 35.080.

The case below presented the Alaska Supreme Court with two major issues:

> that the one year durational residency requirement (of Alaska Hire) violates the State and Federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.

Op. p. 4.

The Alaska Supreme Court unanimously concluded that the one year durational residency requirement to qualify as an Alaska resident under Alaska Hire did in fact violate the State and Federal equal protection clauses, and accordingly held that a durational residency requirement of more than thirty (30) days was not constitutionally permissible. *Op.* p. 31. The majority did find, however, that a bias in favor of actual Alaska residents in oil and gas employment was constitutionally acceptable:

> We believe that the better alternative is to consider Alaska Hire an economic measure justified by the

> 'natural resources exception', the principal that a state may prefer its residents in dealing with natural resources it owns.

Op. p. 26.

Appellants are asking this Court to reverse this second holding. Appellants rely heavily upon the dissent of Justices Boochever and Rabinowitz, which realizes that "the local hire statute runs afoul of the concept of federalism." *Op.* p. 38, and,

> [i]f local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.

Op. p. 40, 41.

A SUBSTANTIAL QUESTION IS PRESENTED

A. The McCready v. Virginia Ownership Exception To The Privileges And Immunities of Citizenship Needs Limiting Clarification If Not Overruling

Appellants believe that Alaska Hire raises a fundamental privileges and immunities question common to all states. There are two classes of people who are treated differently in employment in substantially anything having to do with oil and gas activity in Alaska: residents of Alaska and residents of the other States. Appellants believe that the privileges and immunities section of Article IV of the United States Constitution was specifically enacted to preclude such disparate treatment.

The majority of the Alaska Supreme Court relied virtually exclusively upon a two-page opinion, *McCready* v. *Virginia,* 94 U.S. 391 (1877), in which this Court stated that fishing was not a privilege or an immunity of general citizenship and therefore Virginia "owning land under water adopted to the propagation and treatment of oysters" could grant its citizens exclusive use of it.

The Alaska majority notes that:

> *McCready* v. *Virginia, supra,* has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case.

Op. p. 23.

> The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Op. p. 24.

> We rely on the McCready 'natural resources exception' to the privileges and immunities clause.

Op. p. 25.

Justices Boochever and Rabinowitz comment tellingly in their dissent on the foregoing. Because not susceptible to effective excerpting, their opinion should be read in its entirety. It sets forth fully appellants' position here and eloquently articulates why the question is substantial:

The majority opinion is based on an antiquated line of authority stemming from Corfield v. Corfield, (sic) 6 F.Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. Accord, Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. Corfield limited commercial fishing for shellfish to local fishermen; Geer pertained to game birds and McCready restricted the planting of oysters in Virginia waters to Virginians.

The application of these cases has been severely limited by Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948). There the Court pointed out that McCready was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing 'persuasive independent reasons justifying the discrimination.' The court refused to extend McCready beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that McCready involved regulation of inland waters while Toomer involved the marginal sea. Thus, casting serious doubt on the continued authority of McCready, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, if such it be, should not be expanded to cover this case.

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

The majority bases its holding on the theory that the natural resources of Alaska 'belong' to Alaska and Alaskans. Under this rationale, it has been held that certain state resources may be restricted for state use. But the law here in question is not aimed at restricting oil and gas use to Alaska. In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming McCready has continued viability, however, ready distinctions here, as in Toomer, render that case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. The Alaska act goes much further and restricts nonresident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction. In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil.

Op. p. 32-35.

The problem with the entire ownership theory, which would allow Alaska to give preference to its own citi-

zens, is the inherent compromise of federalism. The dissenters note in this regard that:

> Moreover, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land. As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. *Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in McCready to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.*
>
> Certainly, Alaska has a major problem with unemployment. This problem is particularly acute in rural arctic communities which are faced with the inexorable change from their historic reliance on fish and game for subsistence. Hopefully, by means of valid enlightened legislation such as the Alaska Native Claims Settlement Act and the initiative of community leaders, these concerns may properly be addressed.
>
> In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. . . *It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.* (emphasis supplied).

Op. p. 35-36.

In the very recent case of *Douglas* v. *Seacoast Products, Inc.,* decided on May 23, 1977, 45 L.W. 4488, this Court spoke of its displeasure with the ownership fiction:

> In any event, '[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U.S. at 539-540 (Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' Toomer v. Witsell, 334 U.S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). *Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here. (emphasis supplied).

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachu-

setts in succeeding years. A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. See, e.g., H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 532-539 (1949); cf. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). We cannot find that Congress intended to allow any such result given the well known construction of federal vessel licenses in Gibbons.

It is a slender reed which permits the State of Alaska to require private employers to discriminate against residents of other states in substantially all oil and gas related activities in Alaska.

The privileges and immunities clause requires that citizens of all states be treated equally. The classic statement of the scope of this doctrine is Justice Washington's opinion on circuit in *Corfield* v. *Coryell,* 6 F.Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823) upholding, as against a challenge by a Pennsylvania citizen, a New Jersey prohibition on the gathering of shell fish in New Jersey waters by anyone not "an actual inhabitant and resident" of New Jersey:

> '. . . The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their

> nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities. . .

The particular dangers of discrimination against nonresidents based on State ownership of resources has been pointed out by this Court in cases specifically related to oil and gas utilization.[8] In *Oklahoma* v. *Kan-*

[8] Even though these are commerce clause cases, their reasoning

sas Natural Gas, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute which attempted to restrict the export of natural gas from the State. Oklahoma attempted to justify the restriction on the ground that because the resource belonged to the people of the State and could in fact be left undeveloped by the State, the State was free to impose any restriction it desired on what development did occur. The Court refused to sanction that sort of analysis, commenting that if the statute was allowed to stand, it would grant states powers which would literally destroy the nation. In the Court's words:

> If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its lumber, the mining States their minerals. And why may not the products of the field be brought within the principle. . . . If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet we have said that in matters of foreign and interstate commerce there are no State lines. In such commerce, inside of the States a new power appears and a new welfare—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made greater by a division of its resources, naturally and claimed, with every other State and those of every other State with it.

Of similar import is *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923). There, the statute before the Court was a West Virginia provision directed toward keeping within the State all natural gas there

is appropriate to any purported balance of state ownership with the privileges and immunities of citizenship.

produced which was required for local needs. The Court held that a State could not accord to its own consumers a preferred right of purchase over consumers in other States. *See also, Foster Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928) and *Takahashi* v. *California Fish and Game Commission,* 334 U.S. 410 (1948).

B. A Special Public Interest Does Not Justify Alaska Hire Or Abridgement of The Privileges and Immunities of Citizenship

Notwithstanding its legislative findings (AS 38.40. 010, 020) Alaska Hire is not minority hire, local hire or unemployment hire. Rather *all* Alaska residents are given preference in hire. Even if there were special unemployment problems in Alaska which could justify discrimination then it is those persons who should be given preference, not all residents.

In fact, the majority notes:

> The challengers point out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees.

Op. p. 13.

This reasoning was applied by the majority to the defeat of the durational residency requirement under the equal protection clause and is equally apt in its application to the privileges and immunities problem presented here. Moreover, perceived unemployment problems of one state do not justify discrimination against the residents of the other states. *See Edwards* v. *California,* 314 U.S. 160 (1941), *infra.*

In *Toomer* v. *Witsell,* 344 U.S. 385 (1948), a nonresident fishing restriction case, this Court stated:

> The primary purpose of this [privileges and immunities] clause, like the clause between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' *Paul* v. *Virginia,* 8 Wall (U.S.) 168, 180, 19 L.Ed. 357, 360 (1868).
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Graham v. *Richardson,* 403 U.S. 365 (1971), is helpful as well. The Court held, *inter alia,* that state statutes which denied welfare benefits to resident aliens or to aliens who had not resided in the United States for a given number of years were unconstitutional under the equal protection clause of the Fourteenth Amendment. The two states involved sought to justify their restrictions on eligibility of aliens for public assistance solely on the basis of the states' "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. The Court noted, however, that *Takahaski* v. *Fish and Game Commission,* 334 U.S. 14, 92 L.Ed. 1478 (1948) cast doubt on the continuing validity of the special public interest doctrine in all contexts. The Court had held there that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. The Court held there:

> The Fourteenth Amendment and the laws adopted under its authority best embody a general policy that all persons lawfully in this country shall abide 'in any state' on any quality of legal privileges of all citizens under non-discriminatory laws. 334 U.S. 419.

The Court in *Graham* held:

> Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi,* we conclude that a state's desire to preserve limited welfare benefits for some citizens is inadequate to justify Pennsylvania making non-citizens ineligible for public assistance and Arizona restricting benefits to citizens and long-time resident aliens. First, the special public interest doctrine was heavily grounded on the notion that 'whatever is a privilege rather than a right may be made dependent upon citizenship.' (citation omitted). But this court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' (citations omitted).

Ibid, p. 543.

C.D.R. Enterprises Limited v. *Board of Education, City of New York, et al.*, 412 F.Supp. 1164 (1976) is instructive.[3] There a three-judge district court held that insofar as a New York statute granted a preference for employment in public construction projects to citizens over aliens who were lawfully admitted residents, the statute was unconstitutional. The stated purpose of the New York law was to reduce local unemployment:

> The determination of whether there is a constitutional distinction between 'preference' and 'exclusion' cannot be based on the superceded doctrine of *Crane*. The *State has a duty to all its lawful residents, resident alien or citizen. We must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the bar, and that they have equal access to private employment. Truax v. Raich, supra. Its duty to reduce unemployment is as much a duty to the alien as to the citizen for the very reasons stated by Mr. Justice Blackmun and Mr. Justice Powell* [in *Graham* v. *Richardson*, 403 U.S. 365, 29 L.Ed.2d 534 (1971)]. *See, State* v. *Wylie*, 516 P.2d 142, 149 (Ak. 1973). Discrimination against a class of 'persons' (resident aliens) who are house painters has even less justification in support than discrimination against the same class (resident aliens) for managerial positions in the civil service. (emphasis added).

Ibid, p. 1170.

In discussing *Graham*, the panel observed:

> In *Graham*, which involved the right to welfare assistance, the court held that even though getting enough food to live could be considered a privilege, public assistance could, nevertheless, not be denied a resident alien. The next question is obviously whether the right to work is not as much protected as the right to eat.

[3] Affirmed by this Court in Case No. 75-1817, —— U.S. ——, 97 S.Ct. 721 (1977).

Ibid, p. 1169.

The court concluded in the affirmative. Its reasoning should be as applicable to citizens of the other states as well as resident aliens.

In *Edwards* v. *California*, 314 U.S. 160 (1941), this Court ruled that the State of California could not make it a crime for a person to assist in bringing into the State of California an indigent person. In the Opinion of the Court as authored by Mr. Justice Byrnes it was held:

> . . . The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon 'the wisdom, need, or appropriateness' of the legislative efforts of the States to solve such difficulties . . .
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the

outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' Baldwin v. Seelig, 294 U.S. 511, 523.

CONCLUSION

It is submitted that the opinion of the Supreme Court of Alaska impermissibly endorses parochial isolation and Balkanization to the detriment of the privileges and immunities of the residents of the other states. This question is of substantial constitutional and national stature so as to merit plenary treatment by the Court.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 29th day of August, 1977.

ROBERT H. WAGSTAFF
WAGSTAFF & MIDDLETON
500 L Street
Anchorage, Alaska 99501
Counsel for Appellants

Of Counsel:

LEE S. GLASS
JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

APPENDIX

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3025

Opinion

[No. 1435—June 3, 1977]

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants,*

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees.*

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Robert H. Wagstaff, of Wagstaff and Middleton, Anchorage, for Appellants. Ronald W. Lorensen, Assistant Attorney General, and Avrum M. Gross, Attorney General, Juneau, for Appellees.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Erwin, and Burke, Justices.

CONNOR, *Justice.*

BOOCHEVER, *Chief Justice,* with whom RABINOWITZ, *Justice, joins, dissenting in part.*

I

This case considers the constitutionality of the "Alaska Hire" law, AS 38.40. "Alaska Hire," enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to nonresidents. The statute does not apply to other private employment, nor to public employment.[1] AS 38.40.090(1) defines a resident for these purposes as a person meeting five criteria there listed, of which the most important is that the person must have been physically present in the state, with certain exceptions, for one year.[2]

---

[1] The number of jobs covered by the law varies with the number and size of petroleum and pipeline projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.

Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. *See* AS 38.40.050(a).

[2] AS 38.40.090(1) reads:

"'resident' means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence."

The law was not seriously enforced until 1975, when the state department of labor began issuing residency cards to those who met the statutory standards, and dispatching to pipeline jobs only persons with cards. This suit was filed shortly thereafter.

The eight plaintiffs, appellants here, include non-residents (some of whom have worked on the oil pipeline in the past), persons who have been residents less than one year, and a life-long resident who is not considered a resident for Alaska Hire purposes since he was out of the state for several months last year. The defendants and appellees are Edmund Orbeck, commissioner of labor, and Guy Richard Martin, commissioner of natural resources. They will be referred to as "the state."

The plaintiffs make two major arguments: that the one-year durational residency requirement violates the state and federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.[3]

By consent of the parties, consideration of the motion for preliminary injunction and of the merits was consolidated. The case was submitted on affidavits, depositions, and memoranda of law. No oral testimony was taken. On July 21, 1976, the superior court upheld the law in its entirety and entered judgment in favor of the defendant state officials. This appeal was filed the following day.

Preliminary, the state asserts that the plaintiffs are not entitled to bring this suit because they lack standing and failed to exhaust their administrative remedies. We find these contentions without merit.

---

[3] We agree with the trial court that the plaintiffs/appellants have abandoned their third, fourth, and fifth causes of action, under the due process, eminent domain, and ex post facto clauses. See Maloney v. Brandt, 123 F.2d 779, 782 (7th Cir. 1941); Lewis v. State, 469 P.2d 689, 691-92 n.2 (Alaska 1970). We therefore do not consider them.

Five of the plaintiffs have sworn under oath that they are not residents of Alaska. Under AS 38.40.090(1)(D), they are not eligible to receive residency cards, and, since the department of labor cannot waive the statutory criteria, pursuit of administrative remedies would be useless. *See Weinberger* v. *Salfi*, 422 U.S. 749, 765, 45 L.Ed.2d 522, 538-39 (1975); *Pence* v. *Morton*, 391 F. Supp. 1021, 1025 n.3 (D. Alaska 1975), *rev'd on other grounds* (and this holding approved), 529 F.2d 135, 143 (9th Cir. 1976). Therefore, they have standing to challenge the residency requirement.

Plaintiffs Browning and Dorman are residents who have not lived in Alaska for one continuous year. Under the statute, they are ineligible for residency cards, and administrative remedies could not make them eligible. They therefore have standing to challenge the one-year residency requirement.[4]

Browning and Dorman executed their affidavits in May 1976. Since the preparation of the record on appeal, they may have met the one-year residency requirement. If so, the case is technically moot as to them. Nevertheless, we will address their contentions as though they were not moot, under the recognized exception to the mootness doctrine for cases "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515, 55 L.Ed. 310, 316 (1911); *see, e.g., Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2, 31 L.Ed.2d 274, 279 n.2 (1972); *Doe* v. *State*, 487 P.2d 47, 53-54 (Alaska 1971). Challenges to one-year residency requirements can seldom be pursued through both trial and appellate stages within the one year in which a given plaintiff is aggrieved. Yet there will always be others who have been residents for less than one year.

[4] Since the other plaintiffs have standing to seek all the relief requested, we find it unnecessary to consider whether plaintiff Hicklin was properly made a party to this suit, whether he has standing, and whether he should have pursued administrative remedies.

If we required one of them to begin a new suit, it would probably be moot before appellate review could be obtained. There would never be a decision on the merits.

II

Durational residence requirements are subject to strict scrutiny under the equal protection clauses of the federal and state constitutions because they penalize those who have exercised their fundamental right of interstate migration.[5] *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306 (1974) (nonemergency medical care at public expense, 1 year); *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972) (voting, 1 year); *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969) (welfare benefits, 1 year); *Gilbert* v. *State*, 526 P.2d 1131 (Alaska 1974) (legislative candidacy, 3 years, upheld); *State* v. *Adams*, 522 P.2d 1125 (Alaska 1974) (divorce, 1 year); *State* v. *Wylie*, 516 P.2d 142 (Alaska 1973) (public employment, 1 year); *State* v. *Van Dort*, 502 P.2d 453 (Alaska 1972) (voting, 75 days).

Under strict scrutiny, the law must be struck down unless the state can demonstrate that it is necessary to further a compelling state interest, and is the least drastic means available to further that interest. *Dunn* v. *Blumstein*, *supra* at 342-43, 31 L.Ed.2d at 284-85.[6]

[5] The phrase "right to travel" is often used. But in cases challenging durational residency requirements, the right at stake is to travel into a different state and make one's home there, not merely to travel. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255, 39 L.Ed.2d 306, 313 (1974).

This right nowhere appears in the black letter of the United States Constitution, although it did appear in the Articles of Confederation. United States v. Guest, 383 U.S. 745, 758, 16 L.Ed.2d 239, 249 (1964). Nevertheless, it can no longer be disputed that it is a fundamental right calling for strict scrutiny. Shapiro v. Thompson, 394 U.S. 618, 629-31, 22 L.Ed.2d 600, 612-13 (1969).

[6] This is a question of law, not one of fact. On appeal we examine

In its two most recent durational residency cases, the United States Supreme Court has abandoned this standard. *Maricopa, supra* (striking down a 1-year requirement for non-emergency medical care at public expense); *Sosna* v. *Iowa*, 419 U.S. 393, 42 L.Ed.2d 532 (1975) (upholding a 1-year requirement for divorce). In *Maricopa* the Court was concerned with the nature of the public benefit withheld during the waiting period, stating that a durational residency requirement will be struck down only if it penalizes the right of migration by depriving the recent migrant of a basic necessity of life. This was not enunciated in *Sosna*, although it is an entirely plausible explanation for *Sosna* as well. It has been criticized from a variety of viewpoints. *See, e.g., Maricopa, supra*, at 284-88, 39 L.Ed.2d at 329-32 (Rehnquist, J., dissenting); Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?, 1976 *B.Y.U. L. Rev.* 89, 118-20; Comment, A Strict Scrutiny of the Right to Travel, 22 *U.C.L.A. L. Rev.* 1129 (1975).

We have never used this "basic necessities" reasoning. *See generally Comment*, Durational Residency Requirements: The Alaskan Experience, 6 *U.C.L.A.-Alaska L. Rev.* 50 (1976). On the other hand, our use of strict scrutiny has not always resulted in holding challenged laws unconstitutional. In *Gilbert* v. *State, supra*, we upheld the 3-year residency requirement for members of the legislature imposed by Article II, section 2 of the Alaska Constitution. We held that it was the least restrictive means available to further the compelling state interests in having the voters familiar with their legislators, and legislators familiar with the state and its problems.

---

it de novo. Drope v. Missouri, 420 U.S. 162, 174-75 & n.10, 43 L.Ed. 2d 103, 115 & n.10 (1975); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348-49 (1st Cir. 1975). If the rule were to the contrary, a trial court decision upholding a law would preclude us from engaging in strict scrutiny unless we considered the decision clearly erroneous.

With that background, we proceed to subject the Alaska Hire law to strict scrutiny. The principal precedent is *State* v. *Wylie, supra*, in which we held unanimously that the state could not give a preference in public employment to persons who had lived in Alaska for a year before applying.

The interests which the state seeks to further through the Alaska Hire law are similar to those which were claimed to be "compelling" in *Wylie*. They are set forth in AS 38.40.010 and .020.[7] Through Alaska Hire, the state seeks to reduce the high unemployment rate for Alaska residents, and to use the extraction of Alaska's natural resources as an opportunity to cultivate its human resources.[8] Reducing unemployment, the state said in *Wylie*,

---

[7] These sections read:

"Sec. 38.40.010. State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management.

"Sec. 38.40.020. Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state."

[8] Article VIII, section 2 of the Constitution of Alaska reads:

"The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, *for the maximum benefit of its people.*" (Emphasis added.)

The section is not limited to those of Alaska's people who have been here for at least twelve months.

was also the goal of a durational residency requirement for civil servants.

In *Wylie*, we found that a durational residency requirement for civil servants was not the least drastic means to further this governmental interest. 516 P.2d at 149. Indeed, we seriously questioned whether it furthered that interest at all. Unemployment in Alaska, we noted, is caused in large part by lack of education and vocational training, and there are few jobs—public or private—in rural areas where unemployment is highest. The durational residency requirement did not increase the number of jobs, nor did it necessarily hold down immigration into the state. *Id.* Job training, we suggested, would probably be a more effective way to reduce unemployment, and would not discriminate against recent migrants. *Id.* at 149 n.14.

The superior court found that each of these concerns of *Wylie* is met by AS 38.40 and the manner in which the state has implemented it. Pipeline jobs are mostly in the rural areas and workers are not required to permanently relocate themselves and their families to their place of employment. The workers are fed and housed by their employers and they are able to return to their homes and families during vacation periods. On the other hand, workers are dispatched to many such jobs from union halls in Fairbanks or Anchorage.

The state initiated a training program for unskilled Alaskans with commencement of pipeline construction. It is necessary, the state argues, that the trainees have some guarantee that jobs will be awaiting them if they are to make the commitment of time and effort necessary to leave their rural homes to enter and complete a job training program.

Unlike the situation in *Wylie*, most of the projects covered by Alaska Hire are and will be of a "boom," short-durational nature. If a trainee is to apply the benefits of

his training by getting a job on such a project, he cannot be made to wait until all new arrivals, who may be in a more job-competitive position, have been hired. The project would be completed before that happened.

To state the differences between the facts of this case and *Wylie* is not to decide the issue. There are countervailing considerations.

The extent to which the Alaska Hire law in fact benefits unemployed Alaskans and those in job training is questionable. Alaska Hire does not distinguish among those who have been one-year residents; it gives all of them an absolute preference over those who are not one-year residents. A lifelong Alaskan employed in a private business or the public sector would be entitled to preference under Alaska Hire if he sought a new job. An unemployed person, or one who had just completed a private or public training course qualifying him for pipeline or petroleum employment, but who had taken an extended trip outside the state eleven months earlier, would be unable to obtain preference.[9]

While under strict scrutiny the correlation between the classification made by the statute and the goals sought to be achieved need not be perfect, it must be sufficiently strong that the classification is the least drastic means to achieve those ends. We cannot say that a one-year durational residency requirement is the least drastic means available to the state in its quest for reduced unemployment and a stabilized economy. Therefore, we hold that AS 38.40.090(1)(A) violates the equal protection clauses of the federal and state constitutions.[10] The challengers point

---

[9] Plaintiff Hicklin was born in Alaska and has lived here all his life. He was denied a residency card because he had just returned from six and a half months in the state of Washington where he helped his father build a house.

[10] The state offers as an alternative justification for Alaska Hire,

out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees.

The state stresses an additional fact not present in *Wylie*. In the industries covered by Alaska Hire, there are pools of migratory skilled workers. When a project is complete, they tend not to remain in the area, but to travel to another major construction project or petroleum development elsewhere. Such persons, the state points out, often have a highly mobile lifestyle and in a very short time could acquire the indicia of Alaska residence—mailing address, voter registration, driver's license, auto registration. A durational residency requirement, and not merely a residency requirement, is needed, according to the state, in order to strengthen the local economy and labor force by giving preference to Alaskans who lived here previously and are more likely to stay when the oil and gas project is completed. And we shall demonstrate later in this opinion, Alaska Hire is not invalid in its entirety, and there are steps Alaska can constitutionally take to insure that the preference goes only to *bona fide* residents. Our holding is merely that it sweeps too broadly to define *bona fide*

---

in addition to its police power, the state's proprietary power over the resources it owns. The state asserts it is not subject to the equal protection clause in the management of its property. This is not the law. State v. Wylie, 516 P.2d 142, 146 (Alaska 1973), made it clear that the state in its capacity as *employer* must obey the Fourteenth Amendment. The state as a trustee of property must obey the Fourteenth Amendment. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 1 L.Ed.2d 792 (1957). The Fourteenth Amendment applies equally to a state or city using the police power to regulate private businesses (Turner v. City of Memphis, 369 U.S. 350, 7 L.Ed.2d 762 (1962) (racial segregation in restaurants) and using its proprietary powers to manage its own property (Holmes v. City of Atlanta, 350 U.S. 879, 100 L.Ed. 776 (1955), *vacating* 223 F.2d 93 (5th Cir.) (racial segregation of municipal golf courses).

residency so that no one may qualify until he or she has lived in Alaska for one year.

Nor do the cases upholding a one-year residency requirement for reduced public college tuition support the one-year requirement of Alaska Hire. Those requirements, like Alaska Hire, were enacted to deny the benefit to those who had become residents of the state only upon enrolling at the college. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); *Vlandis* v. *Kline*, 412 U.S. 441, 452, 37 L.Ed.2d 63, 72 (1973) (dictum). But Alaska Hire would resemble an absolute preference in enrollment for one-year residents, not a reduced tuition rate. Those cases do not support such an absolute preference, nor do any others.

The state also suggests that our scrutiny should be less strict because Alaska Hire does not bar non-residents from employment, but merely gives a preference to residents. But as long as there are available Alaska residents, it *is* a bar to those who cannot meet the residency standards. Be it bar or preference, the appellants have sought jobs on the pipeline, but have been unsuccessful because of the Alaska Hire law. A state labor official testified that about 74 percent of the pipeline workforce meet the Alaska Hire residency requirements.

III

The appellants also challenge the constitutionality of the remainder of the Alaska Hire law which, after AS 38.40.090 (1)(A) is stricken, limits these petroleum and pipeline jobs to residents of Alaska. They allege that it violates both the equal protection and privileges and immunities clauses.

A residency requirement does not penalize the right of interstate migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate. Hence it is not subject to strict scrutiny

on that ground. *See McCarthy* v. *Philadelphia Civil Service Comm.*, 424 U.S. 645, 646-47, 47 L.Ed.2d 366, 367-68 (1976); *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 706-07 (Alaska 1975).

Appellants ask that strict scrutiny be applied to the residency requirement because it infringes a claimed fundamental right to work. We have concluded, like the U.S. Supreme Court in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313, 49 L.Ed.2d 520, 524 (1976), that this is not a fundamental right calling for strict scrutiny.[11]

Article I, section 1 of our Constitution states that all people are entitled to "the enjoyment of the rewards of their own industry." That clause, and the indisputable truth that gainful employment is an economic necessity for most people, do not persuade us to apply strict scrutiny. In *Wylie*, notwithstanding that clause, we noted in dictum that the state could impose a residency requirement at the time of application upon applicants for public employment. 516 P.2d at 150 n.15.

We are troubled by the possible ramifications of holding that the right to work is a fundamental right. Our statutes impose prerequisites of varying severity for licenses to

[11] Three cases which are often cited for the existence of such a fundamental right can be explained on other grounds. Traux v. Raich, 239 U.S. 33, 41, 60 L.Ed. 131, 135 (1915), decided decades before the concept of strict scrutiny and multi-tier equal protection review was developed, and Purdy & Fitzpatrick v. State, 456 P.2d 645, 654 (Cal. 1969), both would merit strict scrutiny because the laws in question discriminated against aliens, a "suspect class." Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539 (Cal. 1971), concerned a law which restricted employment opportunities on the basis of sex, a classification which a number of cases including *Sail'er Inn* have held justifies strict scrutiny regardless of the rights or privileges affected. The California Supreme Court, after *Purdy and Sail'er Inn*, refused to apply strict scrutiny to the laws establishing the qualifications for practicing medicine. D'Amico v. Board of Medical Examiners, 520 P.2d 10, 22-23 (Cal. 1974).

pursue many occupations and professions. May the state, for example, require that professionals have graduated from accredited institutions of learning (*e.g.* AS 08.08.130 (4) & AS 08.80.110(3)) only if it can demonstrate to the court that this is the least drastic means to further a compelling state interest? What would be the fate under strict scrutiny of AS 23.40.110(b), which permits union shop or agency shop agreements for public employees? A "fundamental right" of the character suggested by the appellants might unduly constrict the legislature's ability to respond to perceived public needs, without any corresponding benefit to personal liberty or the public good.[12]

Appellants' alternative argument for strict scrutiny of the residency requirement is that non-residents should be declared a suspect class under Alaska's Constitution and therefore entitled to the additional protection of strict

[12] The differences between rights which are "fundamental" and those which are not are analyzed at length in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110, 36 L.Ed.2d 16, 81-88 (1973) (Marshall, Jr., dissenting), and Developments in the Law—Equal Protection, 82 *Harv. L. Rev.* 1965, 1127-31 (1969). Both Justice Marshall and the Harvard commentators reach the conclusion that rights are considered "fundamental" simply because they are believed to be more important than other personal or economic interests. 411 U.S. at 100, 36 L.Ed.2d at 82; 82 *Harv. L. Rev.* at 1128. A balancing of the state's interests and those of the individual is implicit. 411 U.S. at 108, 36 L.Ed.2d at 87; 82 *Harv. L. Rev.* at 1132.

Justice Marshall, citing his *San Antonio* dissent, dissented in Mass. Board of Retirement v. Murgia, *supra*. But he did not believe that the right to work was a fundamental right invoking strict scrutiny; he urged that laws infringing that right be tested by the standard used in cases such as Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225 (1971). This is the standard we adopted in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). His objection was to the use of the extremely deferential standard of City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed.2d 511 (1976), which we no longer use in testing laws against the Alaska Constitution. 427 U.S. 307, 317-23, 49 L.Ed.2d 420, 527-31.

scrutiny for laws which impose disabilities upon them. They base this argument on cases holding that aliens are a suspect class under the federal Constitution.[13] This argument is undercut by *Mathews* v. *Diaz*, 426 U.S. 67, 84-87, 48 L.Ed.2d 478, 493-94 (1976), holding unanimously that alienage is a suspect classification only for state laws, not for federal laws. Alienage most obviously differs from nonresidence in a state because of the difficult and time-consuming process required to become a U.S. citizen, as opposed to the ease with which a person can change his residence to a new state. In addition, the plenary power of the political branches of the federal government to exclude and control aliens has no equivalent in the state government, which cannot similarly exclude or control U.S. citizens resident in other states. *See id.* at 86 n.26, 48 L.Ed.2d at 493-94 n.26.

We do not believe it would be reasonable to require a state to meet the exceedingly exacting standards of strict scrutiny on all the numerous occasions when it seeks to benefit its residents—those who pay its taxes and elect its officers—in preference to persons who reside elsewhere.

Since there is no ground for applying strict scrutiny to the residency requirement, we must use the lower standard of review. Under the state Constitution, the test is laid out in *Isakson* v. *Rickey*, 550 P.2d 359 (Alaska 1976): the classification must bear a fair and substantial relation to a permissible state interest. Under the federal Constitution, the test is much more deferential: the law is to be upheld if

[13] Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1973) (civil service); Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534 (1971) (welfare); Takahashi v. Fish & Game Comm.; 334 U.S. 410, 92 L.Ed. 1478 (1948) (commercial fishing); C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd*, —— U.S. ——, 50 L.Ed.2d 742 (1977) (employment on public works). In all these cases, the state discriminated between resident citizens and resident aliens, not between residents (citizen or alien) and non-resident (citizen or alien).

the legislature could have had any conceivable basis to believe that it furthered a permissible state interest. *E.g., City of New Orleans* v. *Dukes*, 427 U.S. 297, 49 L.Ed.2d 511 (1976).

Since the distinction made by Alaska Hire between residents and non-residents bears a close correlation to the state's interest in providing economic benefit to residents, the subject of dispute is whether this interest is a permissible one for the state to promote. *See Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 709-11 (Alaska 1975); Tussman and tenBroek, The Equal Protection of the Laws, 37 *Calif. L. Rev.* 341, 362-64 (1949); Developments in the Law—Equal Protection, 82 *Harv. L. Rev.* 1065, 1081 (1969). This is the subject of the privileges and immunities clause of Article IV of the United States Constitution, to which we now turn our attention.

Article IV, section 2, of the federal Constitution says that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[14] The privileges and immunities clause is not an absolute; the standard of review is similar to that which we established in *Isakson* v. *Rickey*, *supra*, for equal protection review. *Compare Toomer* v. *Witsell*, 334 U.S. 385, 396, 92 L.Ed. 1460, 1471 (1948) *with Isakson*, *supra*, 550 P.2d at 362 (Alaska 1976).

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether

[14] Alaska's Constitution has no privileges and immunities clause.

> such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

Toomer, 334 U.S. at 396, 92 L.Ed. at 1471, quoted in *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 709 (Alaska 1975) (footnote omitted).[15]

The standard list of "privileges and immunities" is from the opinion of Mr. Justice Bushrod Washington, sitting on circuit in 1823, in *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823). It is, he said, limited to "those privileges and immunities which are, in their nature, fundamental."[16] It includes "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." In *Corfield*, a Pennsylvanian challenged a New Jersey law which limited commercial fishing for shellfish to local fishermen. The law was upheld, on the ground that the fishery was the common property of all the people of New Jersey, and could be limited to them. *Accord*, *Geer* v. *Connecticut*, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); *McCready* v. *Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877) (fish). *Corfield* thus set forth both the rule and the exception, both of which are relevant to this case.

These cases were distinguished in *Toomer, supra*, which struck down a prohibitively high license fee for out-of-

---

[15] *Cf.* In re Griffiths, 413 U.S. 717, 722 n.8, 37 L.Ed.2d 910, 915 n.8 (1973): "Discrimination or segregation [of aliens or non-white persons] for its own sake is not, of course, a constitutionally permissible purpose."

[16] It is longer than the list of fundamental rights which invoke strict scrutiny under the equal protection clause.

state commercial fishermen.[17] The shrimp in *Toomer*, unlike the fish in inland waters involved in *McCready*, migrated along the coast of a number of states and could not be said to belong to any of them. 334 U.S. at 399-403, 92 L.Ed. at 1473-75.[18] The state's "ownership" is less of a legal fiction in this case than it is with respect to fish and game. Alaska Hire does not apply to all jobs in extractive industries, but only those on projects to which the state government has a contractual nexus. *See generally* Alleyne, Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction, 2 *U.C.L.A.-Alaska L. Rev.* 1, 3-8 (1972).

McCready v. *Virginia, supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Appellants, of course, strenuously object to this line of reasoning. They correctly point out that, under *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.Ed. 1117 (1923) and *West* v. *Kansas Natural Gas Co.*, 211 U.S. 229, 55 L.Ed.

---

[17] *Accord*, Mullaney v. Anderson, 342 U.S. 415, 96 L.Ed. 458 (1952) (striking down a similar law of the Territory of Alaska).

[18] This issue is before the United States Supreme Court again this year. Massachusetts v. Westcott, No. 75-1775, *cert. granted*, 50 L.Ed.2d 74 (1976), *argued*, 45 U.S.L.W. 3504 (Jan. 17, 1977). *Westcott* concerns a state law limiting certain offshore fisheries to one-year residents. The Supreme Judicial Court of Massachusetts concluded that it violated the privileges and immunities clause, citing *Toomer*. Commonwealth v. Westcott, 344 N.E.2d 411 (Mass. 1976).

716 (1911), Alaska could not allow the export of oil or gas only after all local needs were met. But these cases were decided under the commerce clause, not the privileges and immunities clause. One of the principal reasons the United States Constitution was written, to replace the old Articles of Confederation, was to make the United States a single economic unit, without barriers to interstate trade. *See generally H.P. Hood & Sons* v. *DuMond,* 336 U.S. 525, 530-39, 93 L.Ed. 865, 870-75 (1949). Laws forbidding or burdening exports from a state, or imports into it, are inconsistent with that principle.

But no commerce clause claim is advanced against Alaska Hire. Accepting the premise that the United States has and should have one common economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Edwards v. *California,* 314 U.S. 160, 86 L.Ed. 119 (1941), does not compel a decision to the contrary. In *Edwards,* the Court held invalid a state law making it a crime to assist indigent non-residents to come into the state. In purpose and in effect, the law was a direct barrier to interstate travel and migration. Alaska Hire does not erect a barrier to interstate travel or migration. With the durational residence requirement stricken, it permits new as well as long-time residents to receive a preference. It gives the state's benefits to those who bear its burdens, without placing any limitation on who may voluntarily assume those benefits and burdens.

We rely on the *McCready* "natural resources exception" to the privileges and immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the "independent reasons" exceptions to the privileges and immunities clause articulated in the quotation from *Toomer, supra.* The trial judge referred to Alaska

Hire as an attempt to solve "problems that may be typified as social, racial, educational, and economic." We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523, 79 L.Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the "natural resources exception," the principle that a state may prefer its residents in dealing with natural resources it owns.

IV

Appellants also challenge the constitutionality of the four indicia of residence other than duration listed in AS 38.40.090(1): maintaining a place of residence in Alaska, residency for voting purposes, no claim of residency elsewhere, and an intent shown by all attending circumstances to be a permanent resident. We find no constitutional fault with any of them, and use our discussion of them to outline in some detail the standards which will govern determination of Alaska residence for the purposes of AS 38.40.[19]

Maintaining a place of residence simply means being ordinarily physically present in Alaska, having a place within Alaska where one ordinarily stays, and having no such place anywhere else. The department of labor con-

---

[19] *See* SLA 1972, ch. 191, § 2, part of the original Alaska Hire act:

> "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

See also the severability clause of general application, AS 01.10.030.

siders that a construction camp may meet this requirement.

Residency for voting purposes, under *State* v. *Van Dort*, 502 P.2d 453 (Alaska 1972), and AS 15.05.010(4) means durational residency for 30 days. In *Van Dort*, we found 30-day residency necessary to further the compelling state interests in preventing fraud and administering elections, and hence a constitutionally valid indicium of bona fide residence. The state does not construe this clause to require a worker either to register or to vote.[20] As in *Van Dort*, in order to determine bona fide residency *vel non*, this 30-day requirement is permissible.

The fourth criterion is that the worker may not claim residency anywhere else during the durational period. Since we have stricken the durational period, we interpret this to mean no claim of residency anywhere else at the time of application or thereafter. Since it is part of the concept of domicile (which is what bona fide residency means for these purposes) [21] that a person may have only

---

[20] The state official in charge of Alaska Hire testified, "we don't really consider voting too strongly . . . . [W]e don't give that criteria [sic] too much weight."

[21] *See* Vlandis v. Kline, *supra*, 412 U.S. at 454, 37 L.Ed.2d at 72-73, and State v. Adams, *supra*, 522 P.2d at 1131-32, durational residency requirement cases using the terms "domicile" and "residence" interchangeably. *See also* Restatement (Second) of Conflict of Laws § 11, comment k (1971).

The fact that the state offers as a justification for Alaska Hire a desire to give these jobs to persons with relatively strong ties to the state, suggests that one of the lower standards of "residency" was not intended in place of the more stringent domicile standard.

AS 36.10.010 provides for an employment preference for state residents in the performance of construction contracts let by the state or a political subdivision of the state. A resident for purposes of AS 36-10, is defined at AS 36.95.010(5) as follows:

> "(5) 'resident' means a person who maintains his domicile in the state: domicile is the true and permanent home of a person

one domicile at a time,[22] this is a reasonable requirement for determining bona fide residency.

Likewise, the fifth criterion, that the surrounding circumstances show an intent to make Alaska one's permanent home, is part of the definition of domicile, the intent to remain and not to go elsewhere.[23] "Permanent" does not require a promise to stay here forever. This indicium is no more subjective or vague than the concept of domicile itself.

The application form for a residency card asks for the following information covering the period of *two* years prior to application: all addresses where the applicant has lived; occasions on which the applicant has been physically outside Alaska, with reasons therefor; voting outside Alaska; claiming residency elsewhere "for any reason"; and all jobs held. Appellants conclude from this that the state department of labor has created a de facto two-year durational residency requirement. The only relevant testimony, that of David Finrow, is to the contrary. He said that evidence of attachment to another jurisdiction within the past two years is not grounds for automatic denial of a card, but that "a person's past practices sometimes indicate what his intentions are with regard to permanent Alaska residence." It goes to the second, fourth, and fifth criteria, not the first. This is in accord with the legal principle that evidence of domicile at an earlier time is evi-

---

> from which he has no present intention of removing and to which he intends to return whenever he is away."

Ramey v. Rockefeller, 348 F. Supp. 780, 788-89 (E.D.N.Y. 1972) (3-judge court) (Friendly, J.), held that, at least for election purposes, a state may not define residence or domicile more strictly than the Second Restatement definition of domicile, and interpreted the requirement of "residence" in a state statute to be the same as the Second Restatement definition.

[22] Restatement (Second) of Conflict of Laws § 11(2) (1971).

[23] *Id.* § 18.

dence of domicile at a later time. 9 J. Wigmore, *Evidence* § 2530 (3d ed. 1940); C. McCormick, *Evidence* § 294 at 695-96 (2d ed. 1972) (statements of intent as to domicile are evidence of domicile at a later time also).

Having concluded that the state may constitutionally give a preference to residents, we find nothing in any of these remaining criteria, or in the state's administration of them, that acts as an impermissible standard for determining residence. The state is constitutionally entitled to use reasonable administrative means to determine who is a bona fide resident and who is not. Domicile or bona fide residence contains an objective requirement of physical presence and a subjective intent requirement. It is not unreasonable to use the objective indicia listed in AS 38.40.090 (1), other than the one-year requirement, to aid in determining whether an applicant has the subjective intent which is a necessary element of bona fide residence.

We note in particular that to be classified as a resident of Alaska, a person may not claim residence elsewhere. A person receiving any benefit from any other state on the basis of his residence in that state—e.g. voting, unemployment compensation, public assistance, "resident" tuition rate for unemancipated children, etc.—would not qualify. Likewise, once a person becomes an Alaska resident for this purpose, he becomes an Alaska resident for all purposes. For example, he must pay all taxes imposed upon residents by this state and the political subdivision in which he resides. He must register any motor vehicles in his possesion with the Alaska department of motor vehicles. Failure to do so would be evidence that the person is not in fact a resident and not entitled to the preference.

Just as a person may register to vote less than 30 days after beginning to reside in Alaska, but may not vote until after 30 days have elapsed, so a person may apply for a residency card within the initial 30 days, but may not receive any preference in hiring during that 30-day period.

As under the election laws, the 30-day period both serves administrative convenience and acts as an indicator of bona fide residence and intent to remain in Alaska.

V

In summary, we affirm the trial court's denial of relief, except with respect to AS 38.40.090(1)(A), imposing a one-year durational residency requirement, which we hold invalid as violating the equal protection clauses of the state and federal constitutions.

AFFIRMED IN PART AND REVERSED IN PART.

BOOCHEVER, *Chief Justice*, with whom RABINOWITZ, *Justice*, *joins, dissenting in part.*

AS 38.40.030 requires that all Alaskan oil and gas leases, easements or right-of-way permits for oil and gas pipelines and unitization agreements contain provisions requiring employment of Alaska residents. Only if qualified Alaska residents are unavailable, may others be employed. The provisions of the act apply also to all employment which is the result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements.[1] Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

The majority opinion is based on an antiquated line of authority stemming from *Corfield* v. *Corfield*, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. *Accord, Geer* v. *Connecticut*, 161 U.S. 519, 40 L. Ed. 793 (1896) (game birds); *McCready* v. *Virginia*, 94

[1] AS 38.40.050.

U.S. 391, 24 L. Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. *Corfield* limited commercial fishing for shellfish to local fishermen; *Geer* pertained to game birds and *McCready* restricted the planting of oysters in Virginia waters to Virginians.

The application of these cases has been severely limited by *Toomer* v. *Witsell*, 334 U.S. 385, 92 L. Ed. 1460 (1948). There, the Court pointed out that *McCready* was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing "persuasive independent reasons justifying the discrimination." The court refused to extend *McCready* beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that *McCready* involved regulation of inland waters while *Toomer* involved the marginal sea. Thus, casting serious doubt on the continued authority of *McCready*, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, *if such it be*, should not be expanded to cover this case. (emphasis added)[3]

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary

[3] 334 U.S. at 402, 92 L. Ed. at 1474.

> conflict between that vital policy consideration and the constitutional command that the State exercise that power. like its other powers, so as not to discriminate without reason against citizens of other States. (footnote omitted)[4]

The majority bases its holding on the theory that the natural resources of Alaska "belong" to Alaska and Alaskans. Under this rationale, it has been held thot certain state resources may be restricted for state use.[5] But the law here in question is not aimed at restricting oil and gas use to Alaska.[6] In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming *McCready* has continued viability,[7] however, ready distinctions here, as in *Toomer*, render that

[4] *Id.*

[5] In People v. Crane, 108 N.E. 427, 430 (N.Y. 1915), then Judge Cardozo stated: "The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens." The *Crane* decision was affirmed in Crane v. New York, 239 U.S. 195, 60 L. Ed. 218 (1915), which held that a state may give preference to its residents when using its funds on public works projects. *Accord*, Heim v. McCall, 239 U.S. 175, 60 L. Ed. 206 (1915); People *ex rel.* Holland v. Bleigh Constr. Co., 335 N.E.2d 469 (Ill. 1975). *Crane* and *Heim* were held no longer to be controlling as applied to preference in state employment of United States citizens over aliens. Sugarman v. Dougall, 413 U.S. 634, 645, 37 L. Ed. 2d 853, 861 (1973). *See also* C.D.R. v. Board of Education, 412 F. Supp. 1164 (E.D. N.Y. 1976), *affirmed*, —— U.S. ——, —— L. Ed. —— (1977).

[6] If the use of the resource were restricted to the state, serious constitutional questions would be involved. In Pennsylvania v. West Virginia, 262 U.S. 581, 67 L. Ed. 1117 (1923), it was held that an attempt by West Virginia to require preference in use of natural gas produced in that state to local consumers had the effect of withdrawing large quantities of gas from interstate markets and was an unconstitutional interference with interstate commerce.

[7] *See* Justice Braucher's cogent opinion in Commonwealth v. Wescott, 344 N.E.2d 411 (Mass. 1976).

case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. The Alaska act goes much further and restricts nonresident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction.[7] In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil. Moreover, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land.[8] As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in *McCready* to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.

Certainly, Alaska has a major problem with unemployment. This problem is particularly acute in rural arctic communities which are faced with the inexorable change from their historic reliance on fish and game for subsistence. Hopefully, by means of valid enlightened legislation such as the Alaska Native Claims Settlement Act[9] and the initiative of community leaders, these concerns may properly be addressed.

---

[7] AS 38.40.050.

[8] Alaska Statehood Act, P. L. 85-508, 72 Stat. 339 (July 7, 1958) Sec. 6.

[9] P. L. 92-203, 85 Stat. 688, 43 U.S.C. 1601 *et seq.* (Dec. 18, 1971).

In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. If economic benefits to residents could justify discrimination, the privileges and immunities clause of the United States Constitution would become meaningless. It was for that reason that we held in *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 711 (Alaska 1975):

> Benefiting economic interests of residents over nonresidents is not a purpose which may constitutionally vindicate discriminating legislation, ...

While Alaska's problem is unique in its specific setting, other states either presently or in the past have confronted similar economic problems.[10] It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.

In my opinion, the local hire statute runs afoul of the concept of federalism. In *The Federalist*, John Jay, Alexander Hamilton and James Madison wrote eloquently of

---

[10] For example, New York state has encountered unemployment and substandard living conditions resulting from waves of migrants to New York City. The vast automobile industry of Michigan is subject to periodic upheavals causing massive unemployment. The exodus of industry from the New England states presents them with equally valid economic reasons for favoring residential employment. California at one time sought to keep out nonresident indigents. In Edwards v. California, 314 U.S. 160, 86 L. Ed. 119 (1941), a law making it a criminal offense to bring or assist in bringing an indigent nonresident into California was held invalid by a unanimous Court. Five justices based their decision on the Commerce Clause. Justice Douglas, speaking for three members of the Court, based his decision on the right of persons to move freely from state to state. He held that the law violated the fourteenth amendment privileges and immunities clause protecting privileges and immunities of national citizenship against state interference. Justice Jackson took a similar approach.

the importance of our being one nation with citizens enjoying the same rights, privileges and protection.[11] These principles were echoed by Justice Cardozo in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L. Ed. 1032, 1038 (1935).[12]

In *Toomer*, Chief Justice Vinson spoke of the privileges and immunities clause in terms of a like philosophy:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of

[11] *The Federalist*, No. 2 (J. Jay) p. 94 (Wright, ed. 1972):

> To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection.

The Federalist, No. 22 (A. Hamilton) p. 192 (Wright, ed. 1972):

> 'The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.' Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

See also The Federalist, No. 42 (J. Madison) (Wright, ed. 1972).

[12] Rejecting the contention that New York could apply its laws for the purposes of economic protection of its dairy industry against out-of-state milk producers, he stated:

> To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

> State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. Indeed, without some provisions of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the public would have constituted little more than a league of States; it would not have constituted the Union which now exists. Paul v. Virginia, 8 Wall (US) 168, 180, 19 L ed 357, 360 (1868).
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State. 334 U.S. at 395-96, 92 L. Ed. 2d at 1471.

If local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.[13]

[13] In Douglas v. Seacoast Products, Inc., 45 U.S.L.W. 4488 (May 23, 1977), the United State Supreme Court has reiterated the concept of federalism in stricking down, primarily on the basis of federal pre-emption and the Supremacy Clause, a Virginia law prohibiting federally licensed vessels owned by nonresidents of Virginia from fishing in Chesapeake Bay. In condemning such restrictive laws, the Court stated:

> Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. 45 U.S.L.W. at 4493. (footnotes omitted, citations omitted)

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3025

Mandate

(CAPTION OMITTED IN PRINTING)

To: Superior Court of the State of Alaska,
Third Judicial District at Anchorage.

Sidney S. Hicklin, et al. filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage in Civil Action No. 76-3300 entitled, "SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHEBS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, Plaintiffs vs. EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, Defendants". The case was heard on October 14, 1976. On June 3, 1977 the court filed its written opinion.

IT IS ORDERED:

The order of the Superior Court, entered on July 21, 1976, is affirmed in part and reversed in part.

WITNESS the Honorable Robert Boochever, Chief Justice of the Supreme Court, State of Alaska, this 13th day of June, 1977.

CLERK OF SUPREME COURT
/s/ Donna Spragg Pegues
DONNA SPRAGG PEGUES

[SEAL]

APPENDIX II

STATE OF ALASKA

[SEAL]

Title 38. Public Lands

ALASKA LAND ACT AS 38.10.180 S

LOCAL HIRE UNDER STATE LEASES
AS 38.40.010 TO 38.40.090

JAY S. HAMMOND
Governor

EDMUND N. ORBECK
Commissioner

ALASKA STATUTES

TITLE 38, PUBLIC LANDS

CHAPTER 05. ALASKA LAND ACT

Sec. 38.05.180. Oil and gas. (a)

(s) Each oil or gas lease issued by the state shall contain a provision requiring the lessee to furnish the Department of Labor a quarterly report regarding the employment on the leased property of state residents. The commissioner of labor shall promulgate regulations necesary to carry out the provisions of this subsection.

(am § 1 ch 65 SLA 1969; am § 1 ch 86 SLA 1970)

CHAPTER 40, LOCAL HIRE UNDER STATE LEASES

SECTION

10. State policy
20. Legislative findings
30. Resident hire
40. Reporting provisions
50. Applicability of chapter
60. Regulations and hearings
70. Penalties
80. Injunctive relief
90. Definitions

Editor's note.—
Section 2, ch.191, SLA 1972 provides: "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

Sec. 38.40.010. State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management. (§ 1 ch 191 SLA 1972)

Sec. 38.40.020. Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state. (§ 1 ch 191 SLA 1972)

Sec. 38.40.030. Resident Hire. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiations of any of the preceding to which the state is a party provisions requiring the lessee to comply with applicable laws and regulations with regard to hire of Alaska residents. The commissioner shall include a provision requiring the hiring of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter.

(b) In implementing this chapter the commissioner of labor shall determine the amount of work which must be performed by qualified Alaska residents under this chapter. In making this determination the commissioner shall consider the nature of the work, the classification of workers, availability of residents, the willingness of residents to perform the work and shall require the maximum feasible effort by employers to fill available jobs with qualified Alaskans.

(c) In implementing this chapter the commissioner of labor may require compliance with the terms and conditions of the Alaska Plan as approved by the United States Secretary of Labor to the extent feasible.

(d) In implementing this chapter the commissioner of labor shall adopt regulations prohibiting discrimination against Alaska residents in hiring practices. (§ 1 ch 191 SLA 1972)

Sec. 38.40.040. Reporting provisions. (a) Persons obligated to meet resident hiring requirements under this chapter shall comply with those reporting provisions which

the commissioner of labor determines are reasonably necessary to carry out the purposes and intent of this chapter.

(b) The Department of Labor shall maintain a file consisting of the names of qualified Alaska residents seeking the type of employment covered by this chapter and resident Alaskans enrolled in approved on-the-job training programs who are qualified to perform the work required under this chapter. (§ 1 ch 191 SLA 1972)

Sec. 38.40.050. Applicability of chapter. (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.

(b) The Department of Labor shall determine a dollar amount value of each project or activity covered by this chapter and set a minimum dollar figure below which this chapter does not apply. In arriving at this minimum dollar figure the department shall consider the benefit which enures to Alaska residents versus administrative and enforcement costs. The department, by appropriate investigation and ruling, shall insure that projects or activities within projects are not artificially divided to prevent coverage under this chapter. The burden is on the person covered by this chapter to show that artificial division has not occurred or is not occurring. (§ 1 ch 191 SLA 1972)

Sec. 38.40.060. Regulations and hearings. (a) The Departments of Labor and Natural Resources shall promulgate appropriate regulations to implement the provisions of this chapter. Regulations promulgated and hearings conducted under this chapter are subject to the Administrative Procedure Act (AS 44.62) except as provided in (b) of this section.

(b) It is the employer's responsibility to determine and adjudge the work qualifications of the prospective employee. A person who is qualified and has been rejected may request a hearing before the Department of Labor to determine if the potential employer is in compliance with the provisions of this chapter. The department shall set a date for and hold a hearing on the question within 10 days of receipt of the request unless the person applying requests a longer period of time. (§ 1 ch 191 SLA 1972)

Sec. 38.40.070. Penalties. (a) The Department of Natural Resources, upon certification of noncompliance of a person by the Department of Labor, after appropriate investigations and hearings, may, subject to judicial review, impose any of the following appropriate penalties:

(1) increase in rental or other forms of compensation received by the state by a factor of no more than 10 but in no event to exceed $100,000;

(2) require the halting of all or any portion of project operations;

(3) stop payments on any or all existing contracts with the state;

(4) remove, for an appropriate period of time the ability of the person to contract with the state or any of its political subdivisions; or

(5) require a noncompliance payment in liquidated damages to the state in an amount equal to seven and one-half times the number of hours required, but not worked by

Alaska residents, times the going wage or salary rate for the particular job or activity involved.

(b) Notwithstanding the provisions of (a) of this section, no penalty may be imposed against a lessee because of noncompliance with the provisions of this chapter by a supplier of the lessee's contractor or subcontractor if the lessee has received and retained a certificate from the supplier certifying that the supplier is in compliance with the provisions of this chapter. No certificate from the supplier is a bar to the imposition of a penalty against a lessee unless the certificate was made (1) upon oath or affirmation, (2) on forms prepared by the commissioner of labor furnished to the lessee before the date of the supplier's noncompliance, and the lessee has furnished a copy of the certificate to the commissioner of labor together with such additional information as the commissioner may require, and (3) by a supplier who is not himself a contractor or subcontractor of the lessee.

(c) The commissioner of labor, by regulation adopted under this chapter, may designate the intervals within which certificates of suppliers must be furnished under this section in order to constitute a bar against the imposition of penalties. (§ 1 ch 191 SLA 1972)

Sec. 38.40.080. Injunctive relief. The Department of Labor or the Department of Natural Resources, in addition to the imposition of any penalties under § 70 of this chapter, may seek injunctive relief against a person not in compliance with the provisions of this chapter; the Department of Natural Resources may seek injunctive relief to enforce penalties imposed under § 70 of this chapter. (§ 1 ch 191 SLA 1972)

Sec. 38.40.090. Definitions. In this chapter "resident" means a person who

(1) except for brief intervals or military service has been physically present in the state for a period of one

year immediately prior to the time he enters into a contract of employment; and

(2) maintains a place of residence within the state; and

(3) has established a residency for voting purposes within the state; and

(4) has not, within the period of required residency, claimed residency in another state; and

(5) shows by all attending circumstances that his intent is to make Alaska his permanent residence.
(§ 1 ch 191 SLA 1972)

Editor's note.—Section 2, ch. 191, SLA 1972, provides: "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

APPENDIX III

Chapter 35. Oil and Gas Leases, Local Hire

Section

10. Employer requirements
11. Reduction of work force
13. Determination of resident status
14. Application
15. Action on applications
16. Appeals from adverse decisions
17. Review by commissioner
20. Private recruitment permitted
25. Notification of project
30. (Repealed)
40. Audits
42. Discrimination against Alaska residents
44. Complaints
46. Investigations, preliminary conference, reconciliation
50. Hearing
55. (Repealed)
60. Employers excluded
70. Quarterly reports
80. Suppliers
90. Definitions

8 AAC 35.010. EMPLOYER REQUIREMENTS. (a) Repealed. (Eff. 8/20/76, Reg. 59)

(b) An employer shall designate by written notice to the director a representative (individually or severally) to work with duly authorized representatives of the department to see that the purposes of this chapter are carried out. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 38.40.030(b) AS 38.40.050
AS 38.40.040(b) AS 38.40.060

8 AAC 35.011. REDUCTION OF WORK FORCE. (a) When either a resident employee or a nonresident employee, working in the same trade or craft, is to be laid off, the nonresident may be retained only if no resident employee is qualified to fill the position.

(b) This section does not require that a resident employee be transferred from employer to employer where a project has more than one employer, nor does it require that a resident employee be transferred from one geographic work unit, camp, or site to another.

(c) This section does not preclude an employer from laying off an entire work crew, irrespective of the resident status of its members, unless the composition of the employer's crew was made in a manner discriminatory to residents before the layoff. A crew, for purposes of this subsection, is a work unit no larger than the employer's smallest subdivision under the supervision of a foreman or that size unit which is traditional or commonly used in the affected industry or project. (Eff. 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.013. DETERMINATION OF RESIDENT STATUS. (a) An initial determination of the residence of an individual will be made by the wage and hour division. A person who has been determined not to be a resident may resubmit an application for resident status if there are new or previously undisclosed circumstances bearing upon that resident status. A subsequent application must note on its face that it is not an initial application and must set forth specifically the new facts or changed circumstances felt by the applicant to establish his Alaska residence.

(b) The wage and hour division will maintain a file of those persons certified as Alaska residents.

(c) The employment security division will ascertain the occupational classification of a resident based upon work experience, training, and education. The information on an individual's willingness to relocate and his resident status will be maintained in the department's job applicant retrieval system. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.040(b)
AS 23.05.130 AS 38.40.060
AS 38.40.030(d)

8 AAC 35.014. APPLICATION. (a) An application for determination of resident status must be made on a form provided by the department. The form is available from the wage and hour division of the Department of Labor, P.O. Box 630, Juneau, Alaska, 99811, or any office of the employment security division.

(b) The application form must be signed by the applicant and certified by a person authorized to do so by AS 09.65.010 or, in the absence of an official empowered to administer oaths, pursuant to AS 09.65.012(a).

(c) An applicant must mail his or her application for resident status to the director, wage and hour division, Department of Labor, P.O. Box 630, Juneau, Alaska, 99811, or deliver a completed application to any employment security office of the department.

(d) An incomplete application will be returned to the applicant without a determination. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.015. ACTIONS ON APPLICATIONS. (a) A determination of the resident status of an applicant will be made by the wage and hour division as soon as possible after receipt of the completed application by the wage and

hour division. In making its determination, the division is not restricted to information provided on the application form; however, additional information considered will be attached, or noted, and made part of the record. The burden of proving Alaska residency by clear and convincing evidence is on the applicant.

(b) Upon determination that the applicant is a resident, the department will issue a certificate of residence to the applicant. The employer may rely on the certificate of residence as proof of a person's resident status for purposes of the Act.

(c) A certificate of residence expires two years after its date of issue, or upon the failure of a person holding the certificate to continue to satisfy any of the provisions of AS 38.40.090 which define the criteria for residence.

(d) Upon expiration of a certificate of residence, a person may obtain a new certificate by following the procedures in sec. 13 of this chapter. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.060
AS 23.05.130 AS 38.40.090
AS 38.40.030(d)

8 AAC 35.016. APPEALS FROM ADVERSE DECISIONS. (a) A determination that an applicant is not an Alaska resident is final unless the adversely affected applicant, or his authorized representative, files a written petition with the director of the wage and hour division, P.O. Box 630, Juneau, Alaska, 99811, appealing the determination. This section does not prohibit the resubmission of an application where there are new facts or circumstances bearing upon the applicant's resident status.

(b) The petition must identify the matter appealed, and give a statement of reasons for the appeal, and any arguments the appellant wishes to make in support of his or

her appeal. A particular form for the petition is not required.

(c) The petition must be received in the office of the director within 20 days after the receipt by the petitioner of the determination being appealed. If the initial decision was mailed to the applicant, the petition must be received within 20 days after the date of the mailing of the determination.

(d) An interested person, including an Alaska resident, who has information or knowledge relevant to an appeal, may submit any evidence, reasons or arguments bearing upon the matter to the director within 10 days of the filing of the petition. This evidence, reasons or arguments will be provided by the director to the petitioner, and the petitioner has 10 days from its receipt to respond in writing.

(e) The director may, at his discretion, grant to the petitioner or a respondent an opportunity for oral argument.

(f) The petitioner has the burden of proving his or her resident status. If proceedings are held in connection with an appeal, they will be conducted as informally and expeditiously as is consistent with good practice.

(g) The petitioner and an interested party who submits evidence, reasons or arguments in connection with any appeal shall, at the time of the initial filing or submission, state his mailing address on the filing or submission. Thereafter, he must promptly inform the director of any change in address, identifying specifically the matter under consideration by the director. A person failing to furnish a mailing address is not entitled to notice in connection with the appeal. Notice in connection with an appeal is adequate if mailed to the last address on record.

(h) A petitioner and an interested party may offer any relevant evidence as they consider appropriate. The director may admit letters, or copies of letters, or other evidence

not ordinarily admissible under the generally accepted rules of evidence. The weight to be attached to evidence presented in any particular form shall be determined by the director, taking into consideration all the circumstances of the particular case. The director will in his discretion require evidence in addition to that offered by the parties in interest.

(i) In computing a period of time prescribed in this chapter for the filing of documents, the day upon which the decision or document to be appealed from or answered was served, or the day of any other event upon which the designated period of time begins to run, is not to be included. The last day of the period computed is to be included unless it is a Saturday, Sunday or holiday. The director may grant an extension of time to a party for good cause shown.

(j) The director will make a written decision on the appeal, includings findings of fact and conclusions of law, and serve the decision on all parties to the appeal. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.050 AS 38.40.030(d)
AS 23.05.060(5) AS 38.40.060
AS 23.05.130

8 AAC 35.017. REVIEW BY COMMISSIONER. (a) If the director upholds the initial determination and denies the appeal, the appellant may petition the commissioner for a review of the director's decision within 10 days of his receipt of the denied appeal. No particular form for the petition is prescribed except that it must identify the matter sought to be reviewed and it must be served upon both the director and the commissioner.

(b) Within five days of receipt of this petition for review the director shall forward the decision and the entire administrative record, including his findings of fact and conclusions of law, to the commissioner.

(c) Within 30 days of receipt of a petition for review, the commissioner will make a decision on the matter which will be final. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.020. PRIVATE RECRUITMENT PERMITTED. (a) This chapter does not prohibit an employer from employing qualified Alaska residents through nongovernment sources. However, if an employer is unable to obtain qualified Alaska residents through nongovernment sources, the employer shall, prior to the employment of any nonresidents, list his employee requirements with an employment office of the department, identifying himself as covered by this chapter. The employer shall allow the department two days, excluding Saturday, Sunday and state holidays, to produce qualified resident workers prior to the employment of nonresidents. If suitable resident workers are not provided within the specified time period, the employer may employ a person possessing the qualifications necessary to perform the work.

(b) An employer may hire nonresidents as casual or intermittent employees if their employment will not exceed five working days.

(c) An employer may hire nonresidents in an emergency. Employment of the nonresidents must be terminated when the emergency ends. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.025. NOTIFICATION OF PROJECT. (a) A person planning to employ individuals on a project shall notify the wage and hour division, P.O. Box 630, Juneau, Alaska, 99811, of the project not less than 15 days before the commencement of any activity. The notification must include a description of the project and an estimate of the required work force by job classification.

(b) Upon the request of the division, the employer shall furnish one copy of any collective bargaining or other agreements relating to the employment of persons on the project. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.040
AS 38.40.060

8 AAC 35.030. EMPLOYEE FILE. Repealed. (Eff. 7/8/76, Reg. 58)

8 ACC 35.040 AUDITS. All employers shall permit access during normal business hours to books, records, and accounts pertinent to compliance with these regulations for purposes of investigation by the department to ascertain compliance with these regulations. (Eff. 6/21/73, Reg. 46)

Authority: 38.40.030
AS 38.40.060

8 AAC 35.042. DISCRIMINATION AGAINST ALASKA RESIDENTS. The following discriminatory practices by an employer subject to the Act against Alaska residents who are employed or seeking employment on a project are prohibited:

(1) hiring nonresidents when residents are known to be available, willing and qualified for employment;

(2) rejection of a resident referred to an employer by a collective bargaining agent in favor of a nonresident of similar qualifications in employment covered by a collective bargaining agreement;

(3) rejection of a resident in favor of a nonresident of similar qualifications in employment not covered by a collective bargaining agreement;

(4) termination of a resident in favor of a nonresident of similar qualifications; and

(5) differentiation in payment of wages, salaries, fringe benefits, and working conditions between a resident and nonresident. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060 AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.044. COMPLAINTS. (a) An Alaska resident who believes he has been discriminated against in violation of AS 38.40 and sec. 42 of this chapter may, on his own initiative or through an attorney, make, sign, and file with the wage and hour division a verified complaint in writing. Assistance in drafting and filing complaints will be available at all offices of the wage and hour division.

(b) The complaint must be on a form provided by the division, the original being signed and verified before a notary public or other person authorized by law to administer oaths and take acknowledgements. When available, notarial service for this purpose will be provided without charge by the department.

(c) A complaint must contain

(1) the full name and address of the person making the complaint (referred to as the "complainant");

(2) the full name and address of the employer against whom the complaint is made (referred to as the "respondent");

(3) a statement of the facts of the alleged discriminatory act;

(4) the date or dates of the alleged act;

(5) a statement of any other action, civil or criminal, instituted in any other forum based on the same grievance

as alleged in the complaint, together with a statement of the status or disposition of the other action.

(d) Complaints must be filed with the wage and hour division at any of its offices, or by mail. Written complaints which are incomplete in form but contain substantially all of the information required in a complaint will be considered filed upon receipt.

(e) A complaint or a request for a complaint form must be made within 15 days of the date of the alleged discrimination or of the date that the complainant became aware of the facts which lead him to believe he was discriminated against.

(f) A copy of all amendments to the complaint made subsequent to service of the notice of hearing, as provided in sec. 50 of this chapter, will be served by the wage and hour division on both the complainant and the respondent, except amendments to the complaint that are entered in the record during the course of the hearing.

(g) The wage and hour division or the complainant may reasonably and fairly amend the complaint, as a matter of right, before the commencement of a hearing.

(h) A complaint, or any part of it, may be withdrawn by the complainant.

(i) If the wage and hour division determines, either on the face of the complaint or after investigation, that the complaint should be dismissed, it will dismiss the complaint and notify the parties by certified mail, return receipt requested, of its determination.

(j) A complainant whose complaint has been dismissed under (i) of this section or following a preliminary conference under sec. 46(f) of this chapter has 15 days from receipt of the notice of dismissal to request a review of the dismissal of the complaint from the commissioner, who will render a decision within 30 days of such a request.

(k) Repealed. (Eff. 8/20/76, Reg. 59) (Eff. 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.060(5) AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.046. INVESTIGATIONS, PRELIMINARY CONFERENCE, RECONCILIATION. (a) Upon receipt of a complaint of discrimination from a resident, the wage and hour division will set a date for a preliminary conference with the parties to be held within 10 days of the receipt of the complaint by the respondent employer, unless a later date is requested by the complainant.

(b) The preliminary conference will be held at a place designated by the wage and hour division, with consideration for the convenience of the parties and witnesses.

(c) The preliminary conference will include a representative of the wage and hour division, the complainant and counsel, if desired, and the respondent and counsel, if desired.

(d) At a preliminary conference the complainant and respondent and their counsel shall discuss the terms of the complaint and an effort to reconcile the differences between the parties will be made by the wage and hour division.

(e) If no reconciliation can be accomplished by a preliminary conference and the circumstances warrant further action, the wage and hour division will set a date for a full hearing on the matter prior to concluding the preliminary conference. The hearing will be held at the convenience of the complainant and respondent, but no later than 30 days following the preliminary conference.

(f) If the wage and hour division determines that no further investigation of the complaint is required following a preliminary conference, a notice of its decision dismissing the complaint shall be given in writing within 15 days

to the complainant and respondent. The notice must state the reasons for that decision and the specifics of any reconciliation arrived at during the preliminary conference. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060(2)
AS 23.05.090
AS 38.40.060

8 AAC 35.050. HEARING. (a) In all cases where a hearing on a complaint of discrimination filed under sec. 44 of this chapter is scheduled, the wage and hour division will determine the time and place of the hearing and deliver or mail a notice of hearing to the complainant, respondent, and any interested party at least 20 days before the hearing. The notice may be waived with the mutual consent of the complainant and respondent.

(b) Notice of the hearing will include the complainant's statement of facts regarding the complaint and specify the regulations and statutes the respondent is alleged to have violated.

(c) The complainant, respondent or an interested party may present relevant evidence at the hearing, including testimony, affidavits and documents relevant to the discrimination complaint for which the hearing is being held. Depositions, affidavits and documents that have been stipulated to by the complainant or respondent prior to the hearing will also be entered into the record.

(d) Oral evidence will be taken only upon oath or affirmation.

(e) Common law rules of evidence will apply except when the hearing officer determines that their application is not required in order to assure fair treatment of the complainant or respondent and that the evidence offered is relevant and of the sort on which responsible persons are accustomed to rely in the conduct of serious matters.

(f) The complainant, respondent and the hearing officer may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matters relevant to the issue even though the matter was not covered in the direct examination. If the complainant or respondent does not testify, he may be called and examined by the hearing officer.

(g) At the request of the complainant or respondent for good cause shown, or upon his own motion, the hearing officer shall issue a subpoena to compel the production of testimony or other evidence at a hearing.

(h) The hearing officer may require that the testimony of a material witness be taken by deposition.

(i) Documents or affidavits intended to be used at a hearing should be submitted to the wage and hour division prior to the hearing so that they may be stipulated to whenever possible.

(j) The hearing officer may order the continuance of a hearing for good cause shown.

(k) If a complainant or respondent does not appear at a hearing that has been set, the hearing officer, unless good cause is shown, will act upon the evidence presently at his disposal without notice to the absent complainant or respondent.

(l) The hearing officer shall prepare a written decision which shall be final. A copy will be mailed or otherwise delivered to the complainant and respondent.

(m) The hearing officer may consolidate hearings of a similar nature based on complaints against the same em-

ployer. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.050 AS 23.05.130(5)
AS 23.05.060 AS 38.40.060(b)

8 AAC 35.055. COMMISSIONER'S DECISION. Repealed. (Eff. 8/20/76, Reg. 59)

8 AAC 35.060. EMPLOYERS EXCLUDED. (a) Employers excluded from coverage under the Act are those employers whose payroll does not exceed $10,000 per quarter.

(b) Those employers claiming exclusion under (a) of this section must submit a quarterly report showing the employer's estimated volume of payroll per quarter for its employees. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.050(b)
AS 38.40.060

8 AAC 35.070. QUARTERLY REPORTS. (a) An employer shall file with the wage and hour division, on or before the end of the month following the quarters ending March 31, June 30, September 30 and December 31 of each calendar year, two certified copies of a report concerning the previous quarter containing

(1) name and address of employer;

(2) total number of employees;

(3) a listing of employees by job site, including

(A) name of each employee of the employer;

(B) permanent residence address of each employee;

(C) social security number of each employee;

(D) place of hire;

(E) date of hire;

(F) date employee terminated (if applicable);

(G) job classification of each employee;

(H) either each employee's resident card number or the date of each employee's residence in Alaska as residence is defined by AS 38.40.090;

(4) the number of the lease.

(b) If a project has occurred in the preceding quarter, each lessee shall, in addition to the requirements of (a) of this section

(1) report all persons employed by his contractors, subcontractors and suppliers in activites resulting from the project; or

(2) submit a certificate from each contractor, subcontractor or supplier stating that they have filed a quarterly report with the wage and hour division as required in (a) of this section or sec. 60(b) of this chapter.

(c) If a lessee, or contractor, subcontractor or supplier employed by a lessee, utilizes an automated data processing system to maintain his employee records, a magnetic tape may be submitted in lieu of a printed report to satisfy the quarterly reporting provisions of this section. The magnetic tape must contain all the information required in (a) and (b) of this section and must be compatible with the automated data processing system used by the department. Upon receipt of the tape, the department will make a copy of the tape and return the original to the person supplying the quarterly report.

(d) If a magnetic tape is provided by the employer to satisfy these quarterly reporting requirements, a notarized statement attesting to the accuracy of the information con-

tained on the tape must accompany its submittal. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060 AS 23.05.180
AS 23.05.080 AS 38.40.030
AS 23.05.090 AS 38.40.040
AS 23.05.100 AS 38.40.060

8 AAC 35.080. SUPPLIERS. (a) Suppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor.

(b) A supplier who provides delivery, installation or pre-operational testing of goods shall not be considered a contractor or subcontractor of the lessee or other person subject to AS 38.40. However, a supplier who provides services for any person or business subject to AS 38.40 shall be considered a contractor or subcontractor and shall be subject to all requirements of AS 38.40 pertaining to contractors and subcontractors.

(c) A supplier shall file with the department and his lessee, on or before the end of the month following the quarters ending March 31, June 30, September 30 and December 31 of each year, a certificate, concerning the previous quarter, provided by the department to the lessee, that he has complied with the requirements of this section. (Eff. 6/21/73, Reg. 46)

Authority: AS 38.40.050
AS 38.40.060

8 AAC 35.090. DEFINITIONS. In this chapter, unless the context requires otherwise

(1) "Act" means AS 38.40, Local Hire Under State Leases;

(2) "commissioner" means the commissioner of the Alaska Department of Labor or his designee;

(3) "department" means the Alaska Department of Labor;

(4) "director" means the director of the wage and hour division of the Alaska Department of Labor or his designee;

(5) "emergency" means a condition which represents a threat to the safety of persons, property or the environment;

(6) "employee" means all persons employed by an employer engaged in a project covered by this chapter;

(7) "employer" means a person who has individuals in his employment engaged in a project covered by this chapter and includes persons providing services for a project covered by AS 38.40;

(8) "hearing officer" means a person designated by the director to conduct hearings;

(9) "lease" means all oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(10) "lessee" means a person who is a party to any oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(11) "project" means any activity conducted for the lessee or his contractor, subcontractor or supplier which is the result of oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, untilization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(12) "qualified" means those persons who, by their education, training and experience or combinations of them, can perform the duties and satisfy the terms and conditions which are usual in the offered employment, provided that the duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry; and

(13) "resident" means a person determined by the department as satisfying the requirements of AS 38.40.090.

(Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.060

Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPENDIX

Washington, D.C. • THIEL PRESS • (202) 638-4621

APPEAL WAS DOCKETED ON AUGUST 29, 1977

PROBABLE JURISDICTION WAS NOTED ON OCTOBER 31, 1977

TABLE OF CONTENTS

Page

I. RECORD ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA 1

II. OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA AS ANNOUNCED ON JUNE 3, 1977 AND FORMALLY ENTERED ON JUNE 13, 1977 5

III. CHAPTER 40. LOCAL HIRE UNDER STATE LEASES – ALASKA STATUTES 6

IV. THE ADMINISTRATIVE REGULATIONS OF THE ALASKA DEPARTMENT OF LABOR RELATING TO THE ACT IN QUESTION ARE SET FORTH IN FULL IN APPENDIX 13

V. ORDER TO CEASE AND DESIST DISPATCHING NON-RESIDENTS WHEN QUALIFIED RESIDENTS ARE AVAILABLE TO FILL PIPELINE PROJECT JOBS, EDMUND A. ORBECK, COMMISSIONER OF LABOR 13

THE SUPREME COURT OF THE STATE OF ALASKA

SIDNEY S. HICKLIN; RUBY E. DORMAN; BETTY CLOUD; TOMMY RAY WOODRUFF; FREDERICK A. MATHERS; HARRY A. BROWNING; EMMETT RAY; and JOSEPH G. O'BRIEN, *Appellants,* v. EDWARD ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of Natural Resources of the State of Alaska, *Appellees.*	Supreme Court File No. 3025 Superior Court File No. 76-3300

RECORD ON APPEAL
(Docket Entries)
Table of Contents

File No. 1	Page
Complaint for Declaratory Judgment and Permanent Injunction, 4/28/76	1 thru 8
Motion for Preliminary Injunction Curtailing Enforcement of Alaska Hire Durational Residency Requirements	9 10

File No. 1, continued		Page
Memorandum in Support of Motion for Partial Preliminary Injunction	11	20
Application for Temporary Restraining Order	21	22
Notice of Hearing		23
Plaintiff's Second Motion for Preliminary Injunction	24	25
Memorandum in Support of Plaintiffs' Second Motion for Preliminary Injunction	26	34
Amended Complaint for Declaratory Judgment and Permanent Injunction	35	42
Affidavit of Tommy Ray Woodruff	43	44
Affidavit of Ruby E. Dorman	45	46
Affidavit of Frederick A. Mathers	47	48
Affidavit of Emmett Ray	49	50
Affidavit of Harry A. Browning	52	52
Memorandum in Opposition to Plaintiffs' Motion for Partial Preliminary Injunction and Second Motion for Preliminary Injunction	53	94
Entry of Appearance		95
Affidavit of Betty Cloud	96	97
Errata Sheet		98
Supplemental Memorandum in Support of Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunctions	99	105
Rebuttal Memorandum	106	116
Second Amended Complaint for Declaratory Judgment and Permanent Injunction	117	123

File No. 1, continued		Page
Affidavit of Joseph G. O'Brien	124	125
Affidavit of Sidney S. Hicklin	126	127
Answer to Amended Complaint	128	130
Motion to Strike		131
Memorandum of Points and Authorities in Support of Motion to Strike	132	134
Motion for Leave to File Second Amended Complaint in Response to Motion to Strike		135
Supporting Memorandum for Leave to File Second Amended Complaint	136	137
Motion for Acceptance of Evidence by Deposition and Conditional Consent to Decision by the Court on the Issue of Permanent Injunction		138
Order (unused)		139
Opposition to Plaintiffs' Motion for Acceptance of Evidence by Deposition	140	141
Supplemental Statement of Opposition to Plaintiffs' Motion for Acceptance of Evidence by Deposition	142	145
Reply to Defendants' Limited Opposition to Plaintiffs' Motion to Consider Deposition Evidence	146	147
Memorandum of Decision and Order, 7/21/76	148	164
Notice of Appeal, 7/22/77		165
Designation of Record on Appeal		166
Statement of Points on Appeal		167

File No. 1, continued		Page
Alaska Supreme Court Opinion, 6/3/77	168	208
Mandate of the Supreme Court, 6/13/77		209
Notice of Appeal to the Supreme Court of the United States of America		210
File No. 2		
DEPOSITIONS		
Deposition of David Finrow	1	51
Deposition of Edmund Orbeck	1	10
Deposition of Guy R. Martin	1	11
File No. 3		
Appellant's Brief, filed 8/17/76	1	54
Appellee's Brief, filed 9/7/76	1	76
Appellant's Reply Brief, filed 9/21/76	1	23

CLERK'S CERTIFICATE

I, Connie S. Staska, Chief Deputy Clerk of the Supreme Court of the State of Alaska, at Juneau, do hereby certify as follows:

1. The record on appeal in the above case was prepared by me and consists of all the matters shown in the foregoing table of contents.

2. The preparation of the record on appeal was completed on August 11, 1977 and forwarded to the Clerk, Supreme Court of the United States, Washington, D.C. via certified airmail on August 11, 1977.

3. Notice of the matters mentioned in paragraph 2 of this certificate was given by me to the persons named below by mailing to each on August 11, 1977 a true copy of this Table of Contents and Certificate.

Robert H. Wagstaff
Wagstaff & Middleton
500 "L" Street
Anchorage, Alaska 99501 *Attorney for Appellants*

Ronald W. Lorensen
Assistant Attorney General
Pouch K
Juneau, Alaska 99811 *Attorney for Appellees*

DATED at Juneau, Alaska, this 11th day of August, 1977.

/s/ Connie Staska

Connie Staska
Chief Deputy Clerk
Supreme Court
State of Alaska

II

OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA AS ANNOUNCED ON JUNE 3, 1977 AND FORMALLY ENTERED ON JUNE 13, 1977

This Opinion is set forth in full with its dissenting Opinions in Appendix I of Appellants' Jurisdictional Statement.

III

Chapter 40. Local Hire Under State Leases.

Section	Section
10. State policy	60. Hearings and investigations
20. Legislative findings	70. Penalties
30. Resident employment	80. Injunctive relief
40. Reporting provisions	90. Definitions
50. Applicability of chapter	

* * *

Editor's note. – Section 2, ch. 191, SLA 1972, provides: "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly.

* * *

Sec. 38.40.010. State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management. (§1 ch 191 SLA 1972)

* * *

Sec. 38.40.020. Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering

from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state. (§ 1 ch 191 SLA 1972)

* * *

Sec. 38.40.030. Resident employment. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter.

(b) All employment falling within the purview of §50 of this chapter shall be filled by Alaska residents if they are qualified and available. The commissioner of labor, whose decision is final as to residency, shall determine the resident status of individuals for purposes of this chapter and issue a certificate to persons determined to be residents of the state. The commissioner may issue exemptions from this chapter to the employer for those individuals he shall determine to be administrative, management, or professional employees of the employer.

(c) In implementing this chapter the commissioner of labor may require compliance with the terms and condi-

of the Alaska Plan as approved by the United States Secretary of Labor to the extent feasible.

(d) The Department of Labor shall adopt regulations necessary to implement the provisions of this chapter. (§1 ch 191 SLA 1972; am §§2 – 4 ch 183 SLA 1976)

* * *

Sec. 38.40.040. Reporting provisions. (a) An employer obligated to meet resident employment requirements under this chapter shall comply with those reporting provisions which the commissioner of labor determines are reasonably necessary to carry out the purposes and intent of this chapter.

(b) The Department of Labor shall prepare a list of certified Alaska residents and, upon request, shall make it available to an employer subject to this chapter, and to any employment or dispatching agency, union, or other similar entity. (§ 1 ch 191 SLA 1972; am §§ 5, 6 ch 183 SLA 1975)

* * *

Sec. 38.40.050. Applicability of chapter. (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.

(b) The Department of Labor shall determine a dollar amount value of each project or activity covered by this chapter and set a minimum dollar figure below which this chapter does not apply. In arriving at this minimum dollar figure the department shall consider the benefit which enures to Alaska residents versus administrative and enforcement costs. The department, by appropriate investigation and ruling, shall insure that projects or activities within projects are not artifically divided to prevent coverage under this chapter. The burden is on the person covered by this chapter to show that artificial division has not occurred or is not occurring. (§ 1 ch 191 SLA 1972)

* * *

Sec. 38.40.060. Hearings and investigations. (a) The Departments of Labor and Natural Resources shall promulgate appropriate regulations to implement the provisions of this chapter. It is the employer's responsibility to initially determine and adjudge the work qualifications of the prospective employee. A qualified Alaska resident who has been rejected for or terminated from employment by an employer subject to this chapter may, within 15 days from the rejection or termination, file a written request for a hearing before the Department of Labor to determine if the employer is in compliance with the provisions of this chapter. The department shall investigate, set a date for and hold a hearing within 30 days after receipt of the request, unless the person applying requests a longer period of time.

(b) The Department of Labor may, on its own motion, conduct appropriate investigations and hearings to determine compliance with the provisions of this chapter.

(c) The commissioner of labor, acting on a complaint or his own motion, upon finding wilful noncompliance by

an employer with the provisions of this chapter, may certify that finding to the Department of Natural Resources.

(d) Hearings and investigations conducted under this section are not subject to the Administrative Procedure Act (AS 44.62), but are subject to judicial review under § 70(a) of this chapter if appealed within 30 days. (§ 1 ch 191 SLA 1972; am § 7 ch 183 SLA 1976)

* * *

Sec. 38.40.070. Penalties. (a) Upon finding that a qualified Alaska resident has been rejected for or terminated from employment, in violation of this chapter, the Department of Labor may require the employer to pay the qualified Alaska resident triple the wages he lost, or any damages or expenses actually incurred as a result of the wrongful action if they exceed the triple wages assessed. The imposition or withholding of any payment or penalty under this section may be appealed to the superior court. The superior court shall hear these matters de novo.

(b) The Department of Natural Resources, upon receipt of a certification of wilful noncompliance of an employer by the commissioner of labor and after appropriate investigations and hearings, may impose the following penalties:

(1) increase rent or other forms of compensation received by the state by a factor of no more than 10 but in no event to exceed $100,000;

(2) require that all or any portion of project operations be halted;

(3) stop payment on any or all existing contracts between that person and the state; or

(4) remove, for an appropriate period of time, the eligibility of the person to contract with the state or any of its political subdivisions.

(c) Notwithstanding (a) of this section, no penalty may be imposed against a lessee because of noncompliance with the provisions of this chapter by a supplier of the lessee's contractor or subcontractor if the lessee has received and retained a certificate from the supplier certifying that the supplier is in compliance with the provisions of this chapter. However, no certificate from the supplier is a bar to the imposition of a penalty against a lessee unless the certificate was made (1) upon oath or affirmation, (2) on forms prepared by the commissioner of labor furnished to the lessee before the date of the supplier's noncompliance, and the lessee has furnished a copy of the certificate to the commissioner of labor together with additional information the commissioner may require, and (3) by a supplier who is not himself a contractor or subcontractor of the lessee.

(d) The commissioner of labor may, by regulation, designate the intervals within which certificates of suppliers must be furnished under this section in order to constitute a bar against the imposition of penalties. (§ 1 ch 191 SLA 1972; am § 8 ch 183 SLA 1976)

* * *

Sec. 38.40.080. Injunctive relief. The Department of Labor or the Department of Natural Resources, in addition to the imposition of any penalties under § 70 of this chapter, may seek injunctive relief against an employer not in compliance with the provisions of this chapter. Either department may seek injunctive relief to enforce penalties which it has imposed under § 70 of this chapter. (§ 1 ch 191 SLA 1972; am § 9 ch 183 SLA 1976)

* * *

Sec. 38.40.090. Definitions. In this chapter

(1) "resident" means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence;

(2) "qualified" means capable, through education, training, or experience, of performing the duties and satisfying the usual terms and conditions of the employment, if those duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry;

(3) "wilful noncompliance" means intentionally, knowingly, or purposely, without justifiable excuse, not giving preference to qualified Alaska residents in employment covered by this chapter;

(4) "noncompliance" means not giving preference to qualified Alaska residents in employment covered by this chapter. (§ 1 ch 191 SLA 1972; am § 10 ch 183 SLA 1972; am § 10 ch 183 SLA 1976)

* * *

IV

THE ADMINISTRATIVE REGULATIONS OF THE ALASKA DEPARTMENT OF LABOR RELATING TO THE ACT IN QUESTION

The Administrative Regulations of the Alaska Department of Labor relating to the Act in question are set forth in full in Appendix III (p. 38a) of Appellants' Jurisdictional Statement.

V

CEASE AND DESIST DISPATCHING NON-RESIDENTS WHEN QUALIFIED RESIDENTS ARE AVAILABLE TO FILL PIPELINE PROJECT JOBS

The Alaska Department of Labor has received numerous complaints alleging that persons who are not Alaska residents have been dispatched on pipeline jobs when *qualified* Alaska residents were available to fill the jobs. That is a violation of Alaska law. (AS 38.40.010 et seq.). It is also a clear violation of the pipeline project agreement. (Article VI, provision 8).

Pursuant to AS 23.05.060(5), YOU ARE HEREBY DIRECTED TO RESPOND TO ALL OPEN JOB CALLS BY DISPATCHING *ALL QUALIFIED* ALASKA RESIDENTS BEFORE *ANY* NON-RESIDENTS ARE DISPATCHED.

An Alaska resident, according to Alaska law, is a person who:

(1) except for brief intervals or military service has been physically present in the state for a period of one year immediately prior to the time he enters into a contract of employment; and

(2) maintains a place of residence within the state; and

(3) has established a residency for voting purposes within the state; and

(4) has not, within the period of required residency, claimed residency in another state; and

(5) shows by all attending circumstances that his intent is to make Alaska his permanent residence. AS 38.040.090.

Individuals may be certified as Alaska residents by applying for and receiving an Alaska Resident Card from the Department of Labor. The state will take action to obtain the IMMEDIATE REMOVAL FROM HIS JOB of any individual who furnishes false information about his residency status. Any individual who falsifies an application or statement concerning residency status will also be subject to CRIMINAL PROSECUTION.

/s/ Edmund N. Orbeck

EDMUND N. ORBECK
Commissioner of Labor

Department of
Labor
State of Alaska
[SEAL]

Executive Order #76-1
Department of Labor
State of Alaska
P.O. Box 1149
Juneau, Alaska 99811
March 1, 1976

Supreme Court, U. S.
FILED
OCT 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION OF

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska

TO DISMISS OR AFFIRM

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA

RONALD W. LORENSEN
Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

RICHARD M. BURNHAM
Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for Appellees.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

MOTION TO DISMISS OR AFFIRM 1

I. STATEMENT OF THE CASE 2

II. ARGUMENT 2

A. The Issue Raised by This Appeal is Very Narrow 3

B. The State Has A Duty to Provide for the Welfare of its Residents 5

C. Alaska Has Effected its Duty, in Part, by Adoption of Local Hire 7

D. Local Hire Does Not Violate the Privileges and Immunities Clause 10

1. McCready is Still Good Law 10

2. Even if the McCready "Exception" No Longer Exists, Local Hire Still Satisfies Standards Applicable to Privileges and Immunities Questions 14

E. Local Hire is Another Example of Valid Discrimination in Favor of Residents Approved by the Court 19

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Barbier v. Connolly, 113 U.S. 27 (1884) 6

C.D.R. Enterprises, Ltd. v. Board of Education, 412 F.Supp. 1164 (1976), aff'd __ U.S. __, 97 S.Ct. 721 (1977) 6

Douglas v. Seacoast Products, Inc., 45 L.W. 4488 (1977) 4

Edwards v. California, 314 U.S. 160 (1941) 3, 11

Cases, continued:	Page
Examining Board v. Flores de Otero, 426 U.S. 572 (1976)	9
Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	3, 8
Geer v. Connecticut, 161 U.S. 519 (1896)	13
H.P. Hood & Sons v. Dumond, 336 U.S. 525 (1949)	11, 14
Kleppe v. State of New Mexico, 426 U.S. 529 (1976)	13
McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976)	19
McCready v. Virginia, 94 U.S. 391 (1877)	10, 11-14, 20
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	19
Missouri v. Holland, 252 U.S. 416 (1920)	13
Oklahoma v. Kansas Natural Gas, 221 U.S. 229 (1911)	3, 8, 9
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	3, 8, 9
Shapiro v. Thompson, 394 U.S. 618 (1969)	19
Sosna v. Iowa, 419 U.S. 393 (1975)	19
State v. Wylie, 516 P.2d 142 (1973)	8
State of New Mexico v. Morton, 406 F.Supp. 1237 (1975)	13
Sugarman v. Dougall, 413 U.S. 634 (1973)	9
Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948)	13-14
The Mayor of the City of New York v. Miln, 11 Pet. 102 (1842)	6
Toomer v. Witsell, 334 U.S. 385 (1948)	13-17
Truax v. Raich, 239 U.S. 33 (1915)	9
Vlandis v. Kline, 412 U.S. 441 (1973)	19
Younger v. Harris, 401 U.S. 37 (1971)	5

UNITED STATES CONSTITUTION	Page
Article IV, Section 2	4, 10
14th Amendment	3, 16
ALASKA CONSTITUTION	
Article I, Section 1	3
Article VIII, Section 2	7
STATE STATUTES	
AS 38.40	3, 16
AS 38.40.010	7, 17
AS 38.40.020	7, 17
AS 38.40.030(b)	16, 18
AS 38.40.050(a)	4, 18
ch. 183, SLA 1976	16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION OF

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska

TO DISMISS OR AFFIRM

Appellees Edmund Orbeck, Commissioner of the Department of Labor of the State of Alaska, and Guy Richard Martin, Commissioner of the Department of Natural Resources of the State of Alaska ("the State") herewith move this Honorable Court, pursuant to Rules 16(b) and 16(c) of the Rules of the Supreme Court of the United

States, to dismiss the above-captioned appeal of appellants Sidney S. Hicklin, *et al.* as not presenting a substantial federal question; or alternatively, to affirm the judgment of the Supreme Court of the State of Alaska. Should the jurisdictional statement of appellants be deemed a petition for certiorari, the State respectfully submits that such petition should be denied, for reasons stated herein.

I.

STATEMENT OF THE CASE

For purposes of these motions, Appellees accept the Appellants' statement of the case as set out at pages 2-8 of their Jurisdictional Statement.

II.

ARGUMENT ON APPEAL

Appellees, the Commissioners of the Alaska Departments of Labor and of Natural Resources (hereinafter "the State") disagree strenously with appellants' assertion that a substantial federal question remains as a result of the Alaska Supreme Court's decision in this case. While conjuring up dire visions of "Balkanization" and "parochial isolation" running rampant through our Nation as a result of the Alaska Court's decision, they fail to provide any analysis or explanation of why this example of a state's legislating to promote the health, welfare, peace and safety of its people should be held to be constitutionally infirm when this Court and numerous lower courts have consistently permitted states to provide benefits to their residents only. This case presents but another example of a state carrying out, within our fed-system, its function and duty of providing for the general welfare of its people.

None of the decisions of this Court cited by appellants requires reversal of the Alaska Court. In fact, most of the cases relied on by the appellants involve commerce clause or federal pre-emption issues; they are not authority for privileges and immunities clause claims – the only claim raised by appellants in their Jurisdictional Statement. We think it clear, upon a consideration of relevant cases, the majority decision of the Alaska Supreme Court, and appellants' Jurisdictional Statement, that the Alaska Court's decision should be affirmed or, in the alternative, that this appeal should be dismissed for want of a substantial federal question.

A. THE ISSUE RAISED BY THIS APPEAL IS VERY NARROW.

In evaluating the arguments of appellants, it is important to keep in mind what this case does and does not involve:

1. The Alaska Supreme Court did not view the State's Local Hire Law, AS 38.40, as creating an impermissible classification between Alaska residents and non-residents under the equal protection clause of the 14th Amendment to the United States Constitution or Article I, Section 1 of the Alaska Constitution. Although appellants challenged the Act on equal protection grounds below, they have not raised the issue here.

2. Appellants have never challenged Local Hire under the commerce clause. Nevertheless, they have chosen to rely on commerce clause cases in their Jurisdictional Statement. E.g., *Oklahoma v. Kansas Natural Gas,* 221 U.S. 229 (1911); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); and *Edwards v. California,* 314 U.S. 160 (1941). As we will show, these cases are inapposite and cannot form the basis for a determination that the appeal

raises a substantial federal question under the privileges and immunities clause.

3. The case does not involve any issues of federal pre-emption, despite the reliance of both the dissent in the Alaska Supreme Court's decision and the appellants in their Jurisdictional Statement on *dicta* in a recent pre-emption decision of this Court, *Douglas v. Seacoast Products, Inc.*, 45 L.W. 4488 (1977).[1]

4. The case does involve a claim by the appellants that Local Hire's scheme for providing an employment preference in certain employment to qualified Alaska residents violates Article IV, Section 2 of the United States Constitution – the privileges and immunities clause.

5. Local Hire applies only to:

> . . . employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas purposes, unitization agreements or any of the preceding *to which the state is a party* after July 7, 1972. AS 38.40.050(a) (emphasis added)

At the height of employment on the Trans-Alaska Pipeline, Summer 1976, it applied to only about six per cent of total employment in the state. Op., p. 2a, Appendix I Appellants' Jurisdictional Statement.

[1] Appellants' reliance on certain of the "patchwork of broader language" which the Court "embroidered" on its pre-emption holding in that case appears to be just the sort of result of that language which Mr. Justice Rehnquist, joined by Mr. Justice Powell, warned against in his separate opinion, concurring in part and dissenting in part. 45 L.W. 4494.

B. THE STATE HAS A DUTY TO PROVIDE FOR THE WELFARE OF ITS RESIDENTS.

Despite appellants' fears of imminent Balkanization of our great Nation, we must point out that the United States is not one large state. Rather, it is a union of independent and sovereign states, each with full power and authority to conduct and regulate its internal affairs, consistently, of course, with those powers retained to the federal government by the Constitution. This is our system of federalism, founded as it is on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

In 1837, this Court described the authority and duty of the states as follows:

> We . . . plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these the authority of a State is com-

plete, unqualified and exclusive. *The Mayor of the City of New York v. Miln*, 11 Pet. 102, 144.

In 1884, Mr. Justice Field, speaking for this Court on the effect of the 14th Amendment on matters within a State's sovereignty, said:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and the good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, *Barbier v. Connolly*, 113 U.S. 27, 28 L.Ed. 923, 925.

These precepts have not diminished over the intervening years, as shown by a case also quoted, for some reason, by appellants:

> *The state has a duty to all its lawful residents*, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, and that they have equal access to private employment. *Truax v. Raich, supra. Its duty to reduce employment* is as much a duty to the alien as to the citizen . . . *C.D.R. Enterprises, Ltd. v. Board of Education*, 412 F.Supp. 1164, 1170 (1976), aff'd ___ U.S. ___, 97 S.Ct. 721 (1977) (emphasis added)

But in addition to the general duty imposed on it as one of the several states within our federal system, the State of Alaska is also under an expressly stated duty to

assure that its natural resources are developed and utilized for the benefit of its people:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and water, for the maximum benefit of its people. Article VIII, Section 2, Alaska Constitution.

It is within the framework of these duties to provide for the welfare of its residents that Alaska's Local Hire Law must be evaluated.

C. ALASKA HAS EFFECTED ITS DUTY, IN PART BY ADOPTION OF LOCAL HIRE .

The first two sections of the Local Hire Law make it clear that it was adopted with reference to the general and express duties described above:

> Sec. 38.40.010. STATE POLICY. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management.
>
> Sec. 38.40.020. LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has

an obligation to assure that the benefits of this employment enure to the residents of the state.

From these provisions it can be seen that the State sought to guarantee that its land and the natural resources on and below it, the common property of its people, would be developed and used to provide the maximum benefit and return possible to them. Accomplishing this purpose meant more than simply assuring that State resources consisting of tax receipts and royalty rights were expended or otherwise applied in the people's interest to build new schools and highways or provide increased services or reduce taxes. It included, as well, assuring that the State's natural resources (those which it owns) are similarly utilized, if at all, in the interest of its people, individually and collectively, toward the end of benefiting Alaska's society and economy overall – "reducing unemployment and 'upgrading Alaska's human resources.' "[2]

Despite the clear language of the Act, however, appellants have yet to focus properly on the application and effect of Local Hire. Unlike the situation in the commerce clause decisions cited by appellants which dealt with the efforts of certain other states to restrict the availability of natural resources produced within those states (*Oklahoma v. Kansas Natural Gas, supra; Pennsylvania v. West, supra;* and *Foster Fountain Packing Co. v. Haydel, supra*), Alaska's Act places no restriction on the

[2]The Alaska Supreme Court has said that "reducing unemployment and 'upgrading Alaska's human resources' " is a compelling governmental interest for purposes of the equal protection strict scrutiny test. State v. Wylie, 516 P.2d 142 (1973). Despite the existence of such an interest in the case, however, it struck the one-year *durational* residence requirement imposed by the State for purposes of an employment preference in State hiring on the grounds that the one-year requirement was not sufficiently tailored to accomplish the valid interest.

product. Further, the Act applies only to oil and gas related property owned, in the true legal sense, by the State of Alaska and not, as was the case in *Oklahoma* and *Pennsylvania,* to all property of a specific kind (natural gas) within the state's borders, be it publicly or privately held. Finally, the Act establishes the resident employment preference provisions as a necessary condition of any oil and gas lease, right-of-way permit etc. granted by the State, or lessor.

The State's nexus with the subject matter it is regulating for the promotion of the general welfare is, therefore, very real and direct. It arises out of ownership and is not based simply on some general attribute of sovereignty authorizing the State to exercise control over the business decisions of private employers. The proposition that a state may regulate the use of the resources which it, on behalf of its people, owns was clearly acknowledged by this Court in *Truax v. Raich,* 239 U.S. 33 (1915) when Mr. Justice Hughes, speaking for the Court in upholding the validity of an Arizona statute attacked as a violation of equal protection for discriminating against aliens,[3] said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.

Ibid, pp. 39, 40.

[3]Recent decisions of this Court treating alienage as a suspect classification for purposes of equal protection analysis, e.g., Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1976) cast substantial doubt on the continuing validity of the holding as it applied to aliens who were residents of Arizona.

Local Hire does no more than limit the distribution of the State's resources and property (those which it owns) and interests in them in a manner which is designed to assure maximum "enjoyment" to Alaskans. In attacking the Act, the appellants would have this Court treat the case as one raising a substantial federal question under the privileges and immunities clause, yet they try to do so on the basis of decisions by this Court invalidating state action in various contexts under the commerce clause, the equal protection clause of the 14th Amendment, and federal pre-emption. As such, the cases are immediately distinguishable and provide no basis for testing the validity of Local Hire under Article IV, Section 2 of the Constitution. At the same time, appellants have attempted no analysis of relevant privileges and immunities precedent to show how they believe the Act fails to comport with this Court's approach to cases raising that issue. Since appellants have provided no argument on that issue to which we can affirmatively respond, we will simply set out our analysis of Local Hire's validity under the privileges and immunities clause.

D. LOCAL HIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

1. McCready is Still Good Law.

In upholding the Act against appellants' attack under the privileges and immunities clause, the Alaska Supreme Court stated that it was relying on the "natural resources exception" to the application of that clause recognized by this Court in *McCready v. Virginia*, 94 U.S. 391 (1877). The Court reasoned as follows:

> *McCready v. Virginia, supra,* has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to

the decision of this case. Article VIII, Section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Appellants, of course, strenuously object to this line of reasoning. They correctly point out that, under *Pennsylvania v. West Virginia*, 262 U.S. 553, 67 L.Ed. 1117 (1923) and *West v. Kansas Natural Gas Co.*, 211 U.S. 229, 55 L.Ed. 716 (1911), Alaska could not allow the export of oil or gas only after all local needs were met. But these cases were decided under the commerce clause, not the privileges and immunities clause. One of the principal reasons the United States Constitution was written, to replace the Old Articles of Confederation, was to make the United States a single economic unit, without barriers to interstate trade. *See generally, H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 530-39, 93 L.Ed. 865, 870-75 (1949). Laws forbidding or burdening exports from a state, or imports into it, are inconsistent with that principle.

But no commerce clause claim is advanced against Alaska Hire. Accepting the premise that the United States had and should have one common economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Edwards v. California, 314 U.S. 160, 86 L.Ed. 119 (1941), does not compel a decision to the

contrary. In *Edwards*, the Court held invalid a state law making it a crime to assist indigent non-residents to come into the state. In purpose and in effect, the law was a direct barrier to interstate travel and migration. Alaska Hire does not errect a barrier to interstate travel or migration. With the durational residence requirement stricken, it permits new as well as long-time residents to receive a preference. It gives the state's benefits to those who bear its burdens, without placing any limitation or who may voluntarily assume those benefits and burdens. *Op.* pp. 17a, 18a, Appendix I, Appellants Jurisdictional Statement.

Appellants assert that the *McCready* "exception"[4] relied on by the Alaska Supreme Court needs limiting clarification, if not overruling. We disagree.

McCready involved a privileges and immunities attack on Virginia's restricting solely to its own citizens the use of the land beneath its navigable waters for the purpose of planting and growing oysters. This Court rejected that attack and upheld the restriction, indicating that the privileges and immunities clause had no application to this type of regulation which was, "in effect, nothing more than a regulation of the use by the People of their common property". The Court then went on to say:

> . . . we think we may safely hold that the citizens of one state are not invested by this clause of the

[4]Although over the years the Court's decision in *McCready* has been regularly described by the courts and commentators as creating an exception to the privileges and immunities clause, it seems to us that the better analysis is to characterize the decision as declaring that sharing in the regulation and distribution of the resources of a given state is not a privilege or immunity of citizens in the several states.

> Constitution with any interest in the common property of the citizens of another state.

Ibid., p. 396.

As the Alaska Supreme Court pointed out in its decision, *McCready* has never been overruled. It has, however, already been clarified through limitation. We know now that *McCready* does not apply to free-swimming fish in the marginal sea, *Toomer v. Witsell*, 344 U.S. 385 (1948), but that it does apply to wildlife which does not migrate across state lines. *Geer v. Connecticut*, 161 U.S. 519 (1896); *Missouri v. Holland*, 252 U.S. 416 (1920).[5] Additionally, it is now clear that *McCready* may not be relied upon to support discrimination by a state against an alien who is a resident of the State. *Takahashi v. Fish and*

[5]This Court had the opportunity to further limit or even overrule *McCready* as it applied to wild animals last year in the case of Kleppe v. State of New Mexico, 426 U.S. 529 (1976). The lower court in that case, which dealt with the constitutionality of the Wild Free-Roaming Horses and Burros Act, had ruled that Act unconstitutional, in part on the theory that the states owned the wild animals within their borders and observing that "[e]ven though the state ownership doctrine has been described as a legal fiction, it has never been abrogated." State of New Mexico v. Morton, 406 F.Supp. 1237 (1975). Although this Court reversed the lower court and held that act constitutional, it did not avail itself of the opportunity to overrule or even further limit *McCready*. The Court simply repeated what it had said years ago:

> Unquestionably the states have broad trustee and police powers over wild animals within their jurisdiction. But as *Geer v. Connecticut* cautions, those powers exist only "in so far as their exercise may not be incompatible with, or restrained by the rights conveyed to the Federal government by the Constitution." 161 U.S., at 528. (citations omitted) *Kleppe, supra*, at 545.

We certainly have no disagreement with that proposition as it applies to the regulation of Alaska's wild animals or its natural resources.

Game Commission, 334 U.S. 410 (1948). Finally, the purpose and scope of the *McCready* ownership theory has been defined by this Court as "expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer, supra* at 402.

Given this decisional framework, we fail to understand why appellants believe *McCready* requires either additional clarification or the judicially drastic step of overruling. The entire direction of their argument in this regard (and that of the two dissenting justices of the Alaska Supreme Court) seems to focus on the possibility that application of *McCready* to state laws limiting the distribution of natural resources to residents will give rise to the economic Balkanization which the commerce clause, not the privileges and immunities clause, was adopted to prevent. See, e.g., *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525 (1949). Certainly, if the effect of such laws were to create an impermissible burden on interstate commerce, those laws should be struck down on that basis. However, a holding that a law is unconstitutional as a violation of the commerce clause is hardly equivalent to saying that, as a matter of law, the challenged statute also violates the privileges and immunities clause. This is the fallacy in appellants' Jurisdictional Statement.

2. Even if the McCready "Exception" No Longer Exists, Local Hire Still Satisfies Standards Applicable to Privileges and Immunities Questions.

But let us assume, *arguendo,* that the "natural resources exception" recognized by *McCready* and subsequent cases is no longer viable to preclude judicial examination, under the privileges and immunities clause, of state enactments which deal with the regulation and

distribution of those natural resources within the state which belong to it and its people. That does not automatically mean, as appellants mistakenly take for granted[6], that Local Hire violates the privileges and immunities clause. As the Court stated in *Toomer, supra:*

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. (footnote omitted)

Ibid., p. 396.

The Court went on to express the following caveat:

> The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Ibid., p. 396.

Certainly, Local Hire operates to discriminate against non-residents in favor of certain Alaska residents[7], i.e.,

---

[6] Nowhere in their Jurisdictional Statement do appellants either state the test articulated by this Court for analyzing the validity of state enactments challenged under the privileges and immunities clause or set out their analysis of how Local Hire fails to meet the standards of that test.

[7] As in Toomer, *supra,* 397, we see no point in asserting that Local Hire is outside the scope of the privileges and immunities clause because it speaks in terms of residents instead of citizens.

those who are available and qualified to perform the work. AS 38.40.030(b).[8] Appellants apparently admit, however, that the classifications of resident/non-resident and the difference in treatment accorded them by the Act do not violate their equal protection guarantees under the 14th Amendment. As we pointed out *ante,* at 3, appellants raised equal protection claims in the Alaska courts under both the Alaska and United States Constitutions. These claims were resolved by the Alaska Supreme Court in favor of the constitutionality of the Act (absent the original one-year durational residency requirement which was struck by the Alaska Court). Appellants have raised no equal protection issue in their Jurisdictional Statement. Consequently, if judicial scrutiny of privileges and immunities claims is no more exacting than that undertaken in equal protection claims,[9] it would seem that, by admitting that Local Hire does not violate equal protection, appellants have foreclosed themselves from asserting that it does violate their privileges and immunities.

But even if the Court's privileges and immunities test is more stringent than its lower tier equal protection test, we think it so clear that the Act will withstand this Court's scrutiny as to call for summary affirmance. The applicable test, as stated in *Toomer, supra,* is two-pronged:

---

[8]Local Hire was amended by the Alaska Legislature in a number of ways in 1976. Appellants' Appendix II, pp. 31a-37a of their Jurisdictional Statement, which purportedly sets out the Local Hire Act, AS 38.40, fails to incorporate those amendments. We have, therefore, set out the amendments, as enacted by ch. 183, SLA 1976, in Appendix I to this brief.

[9]". . . the States should have *considerable leeway* in analyzing local evils and in prescribing appropriate cures." Toomer, *supra,* p. 396. (emphasis added)

1. Are there valid independent reasons for the disparity of treatment?

2. Does the degree of discrimination bear a close relation to those reasons?

These two standards are to be considered in light of "the principle that the States should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer, supra,* p. 396.

We have already demonstrated that there are valid independent reasons for the preference in oil and gas-related employment given to Alaska residents under Local Hire. In enacting Local Hire, the Legislature stated that it sought to accomplish the development of the State's human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management. AS 38.40.010. The Legislature found that "Alaska has a uniquely high unemployment record among the states due to both cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention" and that "the state has an obligation to assure that the benefits of [employment opportunities resulting from exploitation of the state's natural resources] enure to the residents of the state." AS 38.40.020. Additionally, as a state within our federal system, it is the function and duty of Alaska to provide for the general welfare of its own people (i.e., residents), and Local Hire is one of the means chosen by the Legislature to further that general welfare.

As to whether the degree of discrimination established under Local Hire bears a close relation to the reasons for it, we find it difficult to see how anyone could seriously assert that it does not. Certainly appellants have made no

such claim in their Jurisdictional Statement.[10] Local Hire does not apply to all private employment in the state. Further it does not even apply to all oil and gas-related employment in the state. It applies only to that oil and gas-related employment which arises as a result of "oil and gas leases, easements, or right-of-way permits for oil or gas pipeline purposes, utilization agreements or any of the preceding *to which the state is a party* after July 7, 1972." AS 38.40.050(a). As we pointed out earlier, the state has a direct proprietary and contractual nexus to the covered employment.

The law's application is further conditioned as follows:

> . . . the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. AS 38. 40.050(a)

Finally, and probably most important, Local Hire is not even a bar to that employment which is subject to the Act. The Act only requires that Alaska residents who are available and qualified to do the work be hired before non-residents are hired. AS 38.40.030(b). As pointed out by the Alaska Supreme Court, the effect of this employment preference for Alaska residents has been to leave about one quarter of the covered jobs to non-residents. *Op.*, p. 11a, Appendix I, Appellants' Jurisdictional Statement.

---

[10] Appellants have never asserted that the State has no duty to provide for the welfare of its residents, or that it may not effect this duty by discriminating in their favor.

Given the extremely restricted scope of the Act's discrimination, coupled with the unquestionably valid independent reasons for the discrimination, we think it clear that Local Hire must survive any degree of scrutiny which this Court might subject it to under the privileges and immunities clause. Appellants certainly have made no effort to demonstrate otherwise.

E. Local Hire is Another Example of Valid Discrimination in Favor of Residents Approved by the Court.

Before concluding, we would point out that this Court has, over the past several years, approved discriminations in favor of residents in a number of different contexts. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits); *Vlandis v. Kline*, 412 U.S. 441 (1973) (preferential university tuition rates); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (free non-emergency medical care); *Sosna v. Iowa*, 419 U.S. 393 (1975) (filing divorce actions in state court).[11] Appellants have articulated no rationale which might support the resident/non-resident discriminations involved in those cases but not support a discrimination along lines of residence under Local Hire.

---

[11] While some of these decisions involved state-imposed *durational* residency requirements which the Court held to be unconstitutional as a violation of the right to travel or equal protection, we believe it clear from a reading of those decisions that this Court did not view the underlying discrimination in favor of state residents as being constitutionally infirm. See, McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 647 (1976).

III.

CONCLUSION

Based on the foregoing, we believe it clear that the decision of the Alaska Supreme Court in this matter should be affirmed. Appellants' only constitutional claim raised before this Court is based on the privileges and immunities clause, yet in attempting to demonstrate that their claim raises a substantial federal question, they rely almost entirely on holdings and *dicta* of this Court in cases involving the commerce clause and federal preemption. While we do not deny that the State may not act in a manner which is inconsistent with either of these constitutional principles, appellants have made no claim in this case that the State has done so.

Under relevant decisions of this Court, we think it may safely be said that the privileges and immunities clause has no application to decisions by states as to how, in the interest of their people, they will best regulate and distribute the natural resources which belong to the states and their people. However, if what has been referred to as the *McCready* exception does not exempt those kinds of decisions from judicial scrutiny under the privileges and immunities clause, then the appellants' claim must at least be determined against privileges and immunities standards enunicated by this Court. Appellants have failed both to state the applicable standards and to demonstrate why Local Hire does not satisfy them. We think it clear from the analysis of the Act against those standards which we have set out that Local Hire fully comports with the privileges and immunities clause.

In the alternative, we believe the Court should dismiss this appeal for lack of a substantial federal question. This case does not differ in any significant aspect from the

numerous decisions of this Court and the lower federal courts upholding state resident/non-resident discriminations where no durational residence requirement is imposed.

RESPECTFULLY SUBMITTED at Juneau, Alaska, this 7th day of October, 1977.

Respectfully submitted,

OFFICE OF THE ATTORNEY
GENERAL
STATE OF ALASKA

RICHARD M. BURNHAM
Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811

RONALD W. LORENSEN
Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for Appellees.

APPENDIX I

Amendments to AS 38.40

Chapter 40. Local Hire Under State Leases.

Sec. 38.40.030. Resident employment. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter.

(b) All employment falling within the purview of § 50 of this chapter shall be filled by Alaska residents if they are qualified and available. The commissioner of labor, whose decision is final as to residency, shall determine the resident status of individuals for purposes of this chapter and issue a certificate to persons determined to be residents of the state. The commissioner may issue exemptions from this chapter to the employer for those individuals he shall determine to be administrative, management, or professional employees of the employer.

* * *

(d) The Department of Labor shall adopt regulations necessary to implement the provisions of this chapter.

Sec. 38.40.040. Reporting provisions. (a) An employer obligated to meet resident employment requirements under this chapter shall comply with those reporting provisions which the commissioner of labor determines are reasonably necessary to carry out the purposes and intent of this chapter.

(b) The Department of Labor shall prepare a list of certified Alaska residents and, upon request, shall make it available to an employer subject to this chapter, and to any employment or dispatching agency, union, or other entity.

Sec. 38.40.060. Hearings and investigations. (a) The Departments of Labor and Natural Resources shall promulgate appropriate regulations to implement the provisions of this chapter. It is the employer's responsibility to initially determine and adjudge the work qualifications of the prospective employee. A qualified Alaska resident who has been rejected for or terminated from employment by an employer subject to this chapter may, within 15 days from the rejection or termination, file a written request for a hearing before the Department of Labor to determine if the employer is in compliance with the provisions of this chapter. The department shall investigate, set a date for and hold a hearing within 30 days after receipt of the request, unless the person applying requests a longer period of time.

(b) The Department of Labor may, on its own motion, conduct appropriate investigations and hearings to determine compliance with the provisions of this chapter.

(c) The commissioner of labor, acting on a complaint or his own motion, upon finding wilful noncompliance by an employer with the provisions of this chapter, may certify that finding to the Department of Natural Resources.

(d) Hearings and investigations conducted under this section are not subject to the Administrative Procedure Act (AS 44.62), but are subject to judicial review under § 70(a) of this chapter if appealed within 30 days.

Sec. 38.40.070. Penalties. (a) Upon finding that a qualified Alaska resident has been rejected for or terminated from employment, in violation of this chapter, the Department of Labor may require the employer to pay the qualified Alaska resident triple the wages he lost, or any damages or expenses actually incurred as a result of the wrongful action if they exceed the triple wages assessed. The imposition or withholding of any payment or penalty under this section may be appealed to the superior court. The superior court shall hear these matters de novo.

(b) The Department of Natural Resources, upon receipt of a certification of wilful noncompliance of an employer by the commissioner of labor and after appropriate investigations and hearings, may impose the following penalties:

(1) increase rent or other forms of compensation received by the State by a factor of no more than 10 but in no event to exceed $100,000;

(2) require that all or any portion of project operations be halted;

(3) stop payment on any or all existing contracts between that person and the state; or

(4) remove, for an appropriate period of time, the eligibility of the person to contract with the state or any of its political subdivisions.

(c) Notwithstanding (a) of this section, no penalty may be imposed against a lessee because of noncompliance with the provisions of this chapter by a supplier of the lessee's contractor or subcontractor if the lessee has

received and retained a certificate from the supplier certifying that the supplier is in compliance with the provisions of this chapter. However, no certificate from the supplier is a bar to the imposition of a panalty against a lessee unless the certificate was made (1) upon oath or affirmation, (2) on forms prepared by the commissioner of labor furnished to the lessee before the date of the supplier's noncompliance, and the lessee has furnished a copy of the certificate to the commissioner of labor together with additional information the commissioner may require, and (3) by a supplier who is not himself a contractor or subcontractor of the lessee.

(d) The commissioner of labor may, by regulation, designate the intervals within which certificates of suppliers must be furnished under this section in order to constitute a bar against the imposition of penalties.

Sec. 38.40.080. Injunctive relief. The Department of Labor or the Department of Natural Resources, in addition to the imposition of any penalties under § 70 of this chapter, may seek injunctive relief against an employer not in compliance with the provisions of this chapter. Either department may seek injunctive relief to enforce penalties which it has imposed under § 70 of this chapter.

Sec. 38.40.090. Definitions. In this chapter

(1) "resident" means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence;

(2) "qualified" means capable, through education, training, or experience, of performing the duties and satisfying the usual terms and conditions of the employment, if those duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry;

(3) "wilful noncompliance" means intentionally, knowingly, or purposely, without justifiable excuse, not giving preference to qualified Alaska residents in employment covered by this chapter;

(4) "noncompliance" means not giving preference to qualified Alaska residents in employment covered by this chapter.

Supreme Court, U. S.
FILED
DEC 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLANTS

ROBERT H. WAGSTAFF
WAGSTAFF & MIDDLETON
912 W. Sixth Avenue
Anchorage, Alaska 99501

LEE S. GLASS
JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

Counsel for Appellants

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	(ii)
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
FACTUAL STATEMENT	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Alaska Hire Directly Contravenes The Privileges And Immunities Clause	9
A. History of the Privileges and Immunities Clause	9
B. An Examination of This Court's Prior Decisions Involving the Privileges and Immunities Clause Does Not Reveal Any Justification for Alaska Hire	13
C. The State Ownership Theory of McCready v. Virginia Is Neither Apposite Nor Viable	17
D. By Analogy Cases Decided Under the Commerce Clause Preclude Alaska Hire	28
II. Alaska Hire Is In Contravention Of The Fourteenth Amendment	34
A. Equal Protection	34
B. Right to Travel	43
CONCLUSION	47

TABLE OF CASES AND AUTHORITIES

Cases

Austin v. New Hampshire, 420 U.S. 656 (1975) 12, 27, 35, 36

Baldwin v. Fish and Game of Montana, 76-1150 21

Blake v. McClung, 172 U.S. 239 (1898) 38

Brown v. Anderson, 202 F.Supp. 96 (Alaska 1962) 26

C.D.R. Limited v. Board of Education of the City of New York, 412 F.Supp. 1164 (1976), *aff.* __ U.S. __, 97 S.Ct. 721 (1977) 35, 42

Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) 13, 14, 18, 20, 22

Douglas v. Seacoast Products, __ U.S. __, 52 L.Ed.2d 308 (1977) 9, 21, 26

Dunn v. Blumstein, 405 U.S. 330 (1972) 46

Edwards v. California, 314 U.S. 160 (1941) 30

Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 9, 21, 29, 31

Geer v. Connecticut, 161 U.S. 519 (1896) 20, 22, 40

Graham v. Richardson, 403 U.S. 365 (1971) 35, 37, 42

Hughes v. Alexandria Scrap Corporation, 426 U.S. 794 (1976) 31

Kleppe v. New Mexico, 426 U.S. 529 (1976) 27

Lemon v. People, 20 N.Y. 607 (1860) 17, 36

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 35

Mathews v. Diaz, 426 U.S. 67 (1976) 9, 36

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 44

McCready v. Virginia, 94 U.S. 391 (1877) ..... *passim*

Cases, continued

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 7, 44

Mullaney v. Anderson, 342 U.S. 415 (1952) 24

Oklahoma v. Kansas Natural Gas, 221 U.S. 229 (1911) 9, 29

Oyama v. California, 332 U.S. 633 (1948) 35

Paul v. Virginia, 8 Wall. 168 (1869) 16, 25, 36, 38

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 29

San Antonio School District v. Rodrigues, 411 U.S. 1 (1973) 34

Shapiro v. Thompson, 394 U.S. 618 (1969) 9, 43

Slaughterhouse Cases, 16 Wall. 36 (1873) 12

Sugarman v. Dougall, 413 U.S. 634 (1973) 36

Takahashi v. California Fish and Game Commission, 334 U.S. 410 (1948) 26, 30, 35, 39

Toomer v. Witsell, 334 U.S. 385 (1948)..... *passim*

Ward v. Maryland, 12 Wall. 418 (1871) 15

Alaska Statutory Provisions

Alaska Statutes 38.40.050(a) 4

Alaska Statutes 38.40.090 5

Alaska Statutes 43.19 20

Alaska Statutes 43.57.010 20

Alaska Statutes 43.58 20

8 AAC 35.080 5

8 AAC 35.011 3

8 AAC 35.014-015 3

United States Statutory Provision

Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 4

United States Constitutional Provisions

Article IV, Section 2 9

14th Amendment, Section 1 34

Treatises and Other Secondary Material

2 M. Farrand, *The Records of The Federal Convention of 1787* 12

3 M. Farrand, *The Records of The Federal Convention of 1787* 11

5 Journal of the Continental Congress, 547 (1906) 10

9 Journal of the Continental Congress, 888-9 (1906) 10

9 Journal of the Continental Congress, 908-9 (1906) 11

W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States,* 1 Mich. Law Rev. 286 (1902) 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of the State of Alaska is reported at 565 P.2d 159 (1977) and is set out in full in Appendix I of appellants' Jurisdictional Statement.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on June 13, 1977. Notice of appeal and the jurisdictional statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on October 31, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1257(2).

STATUTORY PROVISIONS INVOLVED

Chapter 40, Title 38, Alaska Statutes, entitled "Local Hire Under State Leases" (Alaska Hire), is set forth in the Appendix.

Administrative Regulations have been adopted by the Alaska Department of Labor to implement Alaska Hire. They are set forth in Appendix III of appellants' Jurisdictional Statement.

QUESTION PRESENTED

May the State of Alaska require private employers involved in any oil and gas activities resulting from leases with the State to first hire and last fire Alaska residents in preference to the residents of the other States?

FACTUAL STATEMENT

On January 3, 1959, President Eisenhower executed "A Proclamation" which enabled Alaska to officially become the forty-ninth State of the Union. Section One of the Alaska Statehood Act as passed by the 85th Congress[1] provided that "the State of Alaska is hereby declared to be a State of the United States of America

[1] Public Law 85-508 (72 Stat. §339).

[and] is declared admitted into the Union on equal footing with the other States in all respects whatever. . . ."

Thirteen years later the Legislature of the State of Alaska added Chapter 40 to Title 38 of its statutes which deals with lands. This new law, the constitutionality of which is here at issue, was designated "Local Hire Under State Leases" and has come to be known as Alaska Hire.[2]

In its opinion the Supreme Court of the State of Alaska described Alaska Hire:

> 'Alaska Hire', enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any re-negotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to non-residents.

Juris. App. I, p. 2a.

In addition to this first hired requirement, regulation 8 AAC 35.011 (Juris. App. III, p. 39a) requires non-residents to be fired before Alaska residents. The method of enforcement chosen for Alaska Hire is a scheme of residency identification cards. *See* Cease and Desist Order of Appellee Orbeck, App. IV.[3]

[2] The law as amended is set out in full in the Appendix. Regulations as adopted by the Alaska Department of Labor relating to the inplementation and enforcement of Alaska Hire are set forth in Appendix III (commencijg on page 38-A) of appellants' Jurisdictional Statement, hereinafter Juris. App.

[3] Residency must be affirmatively demonstrated prior to the issuance of a "certificate of residence" 8 AAC 35.014-015 (Juris. App. III, pp. 40a-41a), which is good for two years. Residency is defined by AS 38.40.090 and is the equivalent of domicile. Juris. App. II, pp. 36a-37a.

Speaking to the breadth of Alaska Hire the majority of the Alaska Court found that:

> The number of jobs covered by the law varies with the number and size of petroleum and pipeline projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.[4]
>
> Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. *See* AS 38.40.050(a).[5]

Juris. App. I, p. 2a.

The two dissenting Alaska Justices believed the target of Alaska Hire to be even broader:

> Only if qualified Alaska residents are unavailable, may others be employed. The provisions of the act

---

[4]Witness David Finrow, Alaska Hire program administrator, testified that as of June 1976, of some 36,000 applicants for residency cards, 28,000 had qualified as residents. Finrow Dept., p. 8.

[5]A significant portion of the natural gas pipeline recently approved by President Carter and Congress will be constructed in Alaska. *See* Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719, *et seq.* A national interest in Alaska natural gas is described in the Act and set forth *infra.*

The testimony of Appellee Martin indicates that resulting employment in Alaska may be as great as with the oil pipeline. (Martin Dep., p. 7.)

> apply also to all employment which is the result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

Juris. App. I, p. 23a.

Alaska Hire also applies to the work of "suppliers" on non-State-owned lands who are not parties to any lease with the State. *See* 8 AAC 35.080, Juris. App. III, p. 53a.

Alaska Hire was not seriously enforced until 1975. Juris. App. I, p. 3a. On March 1, 1976, Appellee Orbeck, Commissioner of the Alaska Department of Labor, issued the Cease and Desist Order concerning the enforcement of Alaska Hire as has been reproduced in Appendix IV to this brief.

On April 28, 1976, (R. 1-8) appellants filed a complaint in the Superior Court in Anchorage, Alaska seeking declaratory and injunctive relief from Alaska Hire.

The plaintiffs, here appellants, complained of both the one year durational residency requirement of Alaska Hire and the residency requirement *per se.* Five of the appellants are non-residents of the State of Alaska, principally being residents of the States of Washington and Oregon. One, a life-long Eskimo resident of Alaska, has lost his residency because he had been outside of the State for several months in the past year. Juris. App. I, p. 3a, R. 1-8. *See* AS 38.40.090 (Juris. App. II, pp. 36a-37a).

By agreement of the parties, a motion for a preliminary injunction was presented to the trial court and consolidated with the trial on the merits pursuant to Alaska Civil Rule 65(a)(2).[6] The case was submitted on affidavits, depositions and memoranda of law. Juris. App. I, p. 3a.

On July 21, 1976, the Superior Court in Anchorage denied all relief as prayed for in appellants' complaint, upholding Alaska Hire in its entirety. An appeal was taken the next day to the Supreme Court of the State of Alaska. Juris. App. I, p. 3a. On June 3, 1977, that Court issued its Opinion which is here appealed from.

The case below presented the Alaska Supreme Court with two major issues:

> . . . that the one year durational residency requirement violates the State and Federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.

Juris. App. I, p. 3a.

The Alaska Supreme Court unanimously concluded that the one year durational residency requirement to qualify as an Alaska resident under Alaska Hire did in fact violate State and Federal equal protection clauses, and accordingly held that a durational residency requirement of more than thirty (30) days was not constitutionally permissible. Juris. App. I, p. 22a. A three justice majority did find, however, that a general

---

[6]Identical to Federal Rule of Civil Procedure 65(a)(2).

bias in favor of actual Alaska residents in oil and gas employment was constitutionally acceptable.[7]

Appellants are here asking this Court to reverse this second holding and find such a general residency preference violative of the Constitution of the United States. Appellants commend the dissents of Justices Boochever and Rabinowitz, which recognized that "the local hire statute runs afoul of the concept of federalism", Juris. App. I, p. 27a, and concluded:

> If local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.

Juris. App. I, p. 29a.

---

[7]Even though Alaska Hire contains legislative language that its purpose is to help unemployed Alaskans, the Alaska Supreme Court rejected such a transparency and interpreted the law simply to give an economic preference to all Alaskans:

> The trial judge referred to Alaska Hire as an attempt to solve "problems that may be typified as social, racial, educational, and economic." We are hesitant to clarify Alaska Hire as something other than an attempt to strengthen the Alaskan economy . . . We believe that the better alternative is to consider Alaska Hire an economic measure justified by the "natural resources exception," the principle that a state may prefer its residents in dealing with natural resources it owns.

Juris. App. I, p. 19a.

An interpretation of a state law by the highest court of that state is binding on this Court. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974) and cases there cited.

SUMMARY OF ARGUMENT

Only if qualified Alaska residents are unavailable may the residents of other States be employed on any job which is the result of oil and gas leases, easements, leases, or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Alaska Hire includes employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

The history and purpose of the privileges and immunities clause of Article IV, Section 2 of the Constitution is to provide a milieu for national unity in which citizens of all States will be treated equally regardless of the location of their homes.

Alaska Hire is an example of a primitive and parochial favoritism that runs against the basic concept of the Union. If Alaska is able to resurrect and expand the ownership fiction and justify discrimination against the residents of other States, retaliation in kind will be the predictable order of the day.

Alaska desires both to have its oil and gas resources marketed in the other States and to discriminate against the residents of those States in any related employment. The inequities of this phenomena belie the efficacy of federalism as commanded by the privileges and immunities clause.

A majority of the Supreme Court of Alaska upheld Alaska Hire on the State-ownership theory of *McCready v. Virginia*, 94 U.S. 391 (1877), asserting that Alaska may use its resources discriminatorily to benefit its citizens. *McCready* has effectively been overruled by *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (*see also*

Douglas v. Seacoast Products, ____ U.S. ____, 52 L.Ed.2d 308, 319-320 (1977)).

The ownership cases themselves are distinguishable as they involve access to state property, not employment in a designated industry.

By analogy, cases decided under the commerce clause define some parameters of privileges and immunities and indicate that a State can not restrict its natural resources to its own use. *Oklahoma v. Kansas Natural Gas*, 211 U.S. 229 (1911). When resources such as Alaska oil and gas are placed in commerce, any ownership claims are relinquished. *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928).

Non-residency is a specific suspect class created by the privileges and immunities clause, and is analagous to alienage, *Mathews v. Diaz*, 426 U.S. 67, 85 (1976). Scrutiny reveals that non-residents are denied the equal protection of law by Alaska Hire.

Alaska Hire inhibits interstate travel by making Alaska unattractive to citizens of other States desiring to migrate, resettle, find a new job or start a new life. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

ARGUMENT

I.

ALASKA HIRE DIRECTLY CONTRAVENES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. History of the Privileges and Immunities Clause.

The Privileges and Immunities Clause of Section 2, Article IV of the Constitution of the United States provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This clause had its predecessor in the Articles of Confederation.

On July 12, 1776, a committee of the Second Continental Congress proposed:

> Art. VI. The Inhabitants of each Colony shall heneceforth always have the same Rights, Liberties, Privileges, and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.
>
> Art. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, and Advantages in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same and to any Part of the World, which the Natives of Such Colony Enjoy.[8]

On November 11, 1777, another committee proposed the inclusion of what was to become later the Fourth Article.[9] On November 15, 1777, the Continental Congress approved the inclusion of an article worded thus:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall

[8] 5 Journal of the Continental Congress 547 (1906).

[9] 9 Journal of the Continental Congress 888-9 (1906).

> have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.[10]

The privileges and immunities clause of Article IV, Section 2 of the Constitution was initially proposed by Charles Pinkney of South Carolina, who assured the Constitutional Convention that:

> The Fourth Article respecting the extending of the rights of the citizens of each state, throughout the United States [etc.] is found exactly upon the principles of the Fourth Article of the present confederation.

3 M. Farrand, *The Records of the Federal Convention of 1787*, p. 112.

On Tuesday, August 28, 1787, the following action was taken with respect to what was then referred to as Article XIV (now Article IV, Section 2):

> Art. XIV was taken up.
>
> Genl. Pinkney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves.
>
> On the question (on art. XIV.)

[10] 9 Journal of the Continental Congress 908-9 (1906).

N.Y. ay. Mas. ay. Ct. N.J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. no. Geo. divided [Ayes – 9; noes – 1; divided – 1.]'

2 M. Farrand, *supra* p. 443.[11]

In the *Slaughterhouse Cases*, 16 Wall. 36, 75 (1873), the Court compared the privileges and immunities enunciation of the Articles with that of the Constitution.

> There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

More recently, in *Austin v. New Hampshire*, 420 U.S. 656 (1975), this Court discussed the history behind the clause.

> The [privileges and immunities] Clause thus establishes a norm of comity without specifying a particular subject as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment. The origins of the Clause do reveal, however, the concerns of central import to the framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread . . . . The discriminations at which this clause

[11] This is all that exists of the actual Constitutional Convention record on the clause, other than references to the work of the Committee on Style. This concept of federalism, also reflected in the national motto, was apparently so fundamental to the Founders that it did not require debate.

> was aimed were by no means eradicated during the short life of the Confederation, and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation.

Ibid, p. 660, 661.

On this force for a single nation Alexander Hamilton wrote "It may be esteemed the basis of the Union".[12]

It is against this fundamental constitutional requirement of comity, unity and federalism that Alaska Hire must be tested.

B. An Examination of This Court's Prior Decisions Involving the Privileges and Immunities Clause Does Not Reveal Any Justification for Alaska Hire.

The first federal case interpreting the privileges and immunities clause is *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). The case, decided by Associate Justice Bushrod Washington sitting as Circuit Justice, concerned a New Jersey law which provided in pertinent part:

> . . . that it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state, on board of any . . . vessel, not wholly owned by some person, inhabitant of, and actually residing in this state; and every person offending herein, shall forfeit and pay . . . .

[12] Federalist CXXX.

In language very often quoted he described his perception of the general embrace of the privilege and immunities clause:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Ibid, p. 551-552.

Justice Washington nevertheless upheld the exclusive taking by New Jersey residents of oysters, clams and shells stating that they belonged to those residents.

Corfield is readily distinguishable from the case at bar. The State of New Jersey was not restricting or

preferring to its residents employment in any job related to the oyster, clam, or shell industry. It limited only the actual taking of such shellfish to its residents. If New Jersey had discriminated against all non-residents in the shellfish industry, Justice Washington's description of the privileges and immunities of state citizenship would have been squarely compromised.

One of Justice Washington's prime reasons for upholding the limitation of access to fisheries resources was conservation. *Ibid*, p. 552. Such a justification has no application to the giving of preference to Alaska residents in any oil and gas related employment as there is no relationship between residency in employment and conservation of resources. Indeed, the employment in question specifically involves the depletion of non-renewable resources.

In *Ward v. Maryland*, 12 Wall. 418 (1871), the Court ruled unconstitutional a Maryland statute which prohibited the sale of goods, other than agricultural products and articles manufactured in Maryland in a certain district, by persons not residents in the State unless they first purchased a license. The Court stated:

> Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of the Citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in

> the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. . . . [I]t follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that enacted by law of such permanent residents.

Ibid, p. 452-453 (citations omitted)

The Court thus specifically recognized the constitutional right of a resident of one State to travel to another State for the purpose of work, free from any discriminatory restrictions imposed by the other State.

As noted by the Court, *Paul v. Virginia*, 8 Wall. 168 (1869), is also helpful to this issue. The Court held that a corporation is not a citizen within the meaning of the privileges and immunities clause, and that accordingly a state law requiring foreign insurance companies in the State to file security before they issue policies was constitutional. In speaking of the privileges and immunities of Article IV, Section 2, Justice Field noted for the Court that:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom

> possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Lemmon v. People, 20 N.Y. 607.
>
> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Ibid, p. 180.

Alaska Hire impresses the disability of alienage on non-residents, contrary to both the spirit and reality of Union.

C. The State Ownership Theory of McCready v. Virginia Is Neither Apposite Nor Viable.

The case of *McCready v. Virginia*, 94 U.S. 391 (1877), is the key and central case relied upon by the majority of the Alaska Supreme Court in upholding Alaska Hire. "We rely on the McCready 'natural resources exception' to the privileges and immunities clause." Juris. App. I, p. 18a. The question there determined was whether Virginia could prohibit citizens of other states from planting oysters in tidelands owned by the State of Virginia. The Court held that the planting of oysters was a local property right and not a

privilege or immunity of citizenship. Citing Justice Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the Court stated that:

> Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. . . . Following, then, this statutory rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the constitution with any interests in the common property of the citizens of an other state. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional right to the enjoyment of this privilege of Virginia citizenship. . . . Oysters in the soil covered by water owned in common by the People of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit; and if the State in the regulation of its public domain, can grant to its own citizens exclusive use of dry land, we see no reason why it may not do the same thing in respect to such as are covered by water.

Ibid, p. 396.

McCready is more distinguishable than *Corfield*. *McCready* did not concern a statute of Virginia which gave employment preference to all Virginians engaged in the oyster industry and its related suppliers. It narrowly concerned, and looked "only to the particular right . . . asserted," *Ibid*, p. 395, *access* to state owned fishing beds. "[E]ach state owns the beds of all

tidewaters in its jurisdiction." *Ibid*, p. 394. Appellants here seek no access to Alaska oil and gas. They wish only to be treated equally in employment opportunity.

Moreover, Alaska's assertion of exclusive ownership of oil and gas resources is seriously undercut factually by the national interest described by Congress in the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719:

> §719. Congressional findings.
>
> The Congress finds and declares that –
>
> (1) a natural gas supply shortage exists in the contiguous States of the United States;
>
> (2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;
>
> (3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and
>
> (4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system.

Even though the State of Alaska believes it can discriminate against residents of the other States in oil and gas related employment under the ownership

theory, nonetheless it is willing to have its resources marketed in the other States in order to gain taxpayer revenues.[13] "In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states." Juris. App. I, p. 25a. This fact alone dramatically distinguishes Alaska Hire from the issues presented in *Corfield, McCready* and *Geer v. Connecticut*, 161 U.S. 519 (1896), the cases relied upon by the Alaska majority. Juris. App. I, p. 16a.[14]

---

[13]Chapter 57 of Title 43 of the Alaska Statutes provides in part:

> Sec. 43.57.010. Oil and gas regulation and conservation tax.
>
> (a) There is levied upon the producer of oil a tax of one-eighth of one cent on each barrel of oil removed or sold from each lease or property in the state, less any part the the ownership or right to which is exempt from taxation.
>
> (b) The tax is in addition to and shall be administered and paid in the same manner as the taxes imposed on ch. 55 of this title. Producers of oil are required to make reports of production in the same manner and under the same penalities as required by ch. 55 of this title.
>
> (c) Proceeds from the tax shall be paid into the general fund. (§1 ch 5 FSSLA 1973)

Chapter 58 of Title 43, Alaska Statutes, provides for an Ad Valorem tax on oil and gas properties. Tax payer revenues are derived virtually exclusively from sales in other states. Alaska has also adopted the Multi-state Tax Compact, Chapter 19, Title 43, Alaska Statutes.

[14]In *Geer v. Connecticut*, 161 U.S. 519 (1896), the Court held that the police power of the State to preserve game birds as a valuable food supply for its people justified a statute prohibiting transportation of such birds beyond the State.

Geer is distinguishable on the same basis as *Corfield* and *McCready*. It concerns conservation and access to state owned game, not employment in the commercial game industry.

[footnote continued]

In *McCready* the Court specifically noted that, "There is here no question of transportation or exchange of commodities but only of cultivation and production." *Ibid*, p. 395. *See Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) *infra*.

The arguments before the Court in *McCready* also urged conservation as a justification for discrimination. The brief of Defendant in Error, State of Virginia, maintained (p. 2):

> If this doctrine be supported, it will be attended with consequences both novel and disastrous, not to Virginia only, but to all the States on the Atlantic border – all of which have oyster fisheries and other fisheries within their limits. These States will abandon the care of interests in which they find they have no separate and exclusive right, and the whole property will soon be exhausted and destroyed by such a promiscuous and common use of it as will inevitably ensue.

The Alaska majority said of *McCready*:

> *McCready v. Virginia, supra*, has been distinguished, but it has never been overruled. We

---

According to Defendant in Error, State of Connecticut, the case concerned only fish and game laws, not natural resources in general. Their brief states (p. 5):

> It is believed that every State in the Union has its game laws, and that it is a matter that does not concern the government of the United States, and with which, fortunately, it has nothing to do. If it had it would hardly find time to give its attention to anything else.

Prior to *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (*see also Douglas v. Seacoast Products*, ___ U.S. ___, 52 L.Ed.2d 308, 319-320 (1977) it could have been argued that fish and game was in a special class distinct from other natural resources. *Baldwin v. Fish and Game of Montana*, 76-1150, pending before the Court may determine if *Toomer* only applies to commercial fish and game.

have concluded that it states the principle applicable to the decision of this case. . . . The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Juris. App. I, p. 17a.

Justices Boochever and Rabinowitz comment tellingly in their dissent on this reliance. They set forth appellants' position before this Court.

> The majority opinion is based on an antiquated line of authority stemming from Corfield v. Corfield, [sic] 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. Accord, Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. Corfield limited commercial fishing for shellfish to local fishermen; Geer pertained to game birds and McCready restricted the planting of oysters in Virginia waters to Virginians.
>
> The application of these cases has been severely limited by Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948). There the Court pointed out that McCready was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing 'persuasive independent reasons justifying the discrimination.' The court refused to extend McCready beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that McCready involved regulation of inland waters while Toomer involved the marginal sea. Thus, casting serious doubt on the continued authority of McCready, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, if such it be, should not be expanded to cover this case.

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have a power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

The majority bases its holding on the theory that the natural resources of Alaska 'belong' to Alaska and Alaskans. Under this rationale, it has been held that certain state resources may be restricted for state use. But the law here in question is not aimed at restricting oil and gas use to Alaska. In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming McCready has continued viability however, ready distinctions here, as in Toomer, render that case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. *The Alaska act goes much further and restricts non-resident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction. In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil.* (emphasis supplied)

Juris. App. I, pp. 23a-26a.

As the dissent correctly points out, *Toomer v. Witsell,* 334 U.S. 385 (1948), severely limits if not overrules the *McCready* state ownership doctrine.[15] The majority in *Toomer* held that even though the license fee did not unduly burden interstate commerce, an additional fee on a discriminatory basis was without reasonable basis and, therefore, a violation of the privileges and immunities clause.[16] In speaking of the privileges and immunities clause the *Toomer* Court commented:

> The primary purpose of this clause, like the clauses between which it is located – those relating to full faith and credit and to interstate extradition of fugitives from justice – was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the

[15] *See also Mullaney v. Anderson,* 342 U.S. 415 (1952).

[16] Thus indicating that even closer scrutiny may be required under the privileges and immunities clause than under the commerce clause. *See* discussion, n. 21 *infra.*

same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. (U.S.) 168, 180, 19 L.Ed. 357, 360 (1868).

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State . . .

> . . . It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. (footnotes omitted)

Ibid, p. 395-397.

Alaska Hire discriminates against non-residents solely because they are residents of other States. It is admittedly a general economic preference for Alaska residents. Juris. App. I, p. 19a.

The *Toomer* Court concluded:

> Thus we hold that commercial shrimping in the marginal sea, *like other common callings*, is within the purview of the privileges and immunities clause. (emphasis supplied)

Ibid, p. 403.[17]

It is factually erroneous to refer to *McCready* as creating a natural resource exception; it speaks only of a tidal river planting ground exception. Limiting *McCready* to its facts as was done in *Toomer v. Witsell* limits it to the planting of oysters in tidelands of Virginia rivers.

In the very recent case of *Douglas v. Seacoast Products, Inc.*, decided on May 23, 1977, ____ U.S. ____, 52 L.Ed.2d 308 (1977) the Court again voiced its displeasure with the ownership fiction:

> In any event, '[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U.S. at 539-540 (Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' Toomer v. Witsell, 334 U.S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). *Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here.
>
> Our decision is very much in keeping with sound policy considerations of federalism. . . . Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. See, e.g., H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 532-539 (1949); c.f. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

Ibid, pp. 319-320 (emphasis supplied).[18]

It is a slender reed which the State of Alaska believes permits it to require private employers to discriminate against residents of other States in substantially all oil and gas related activities in Alaska.

A recent general enunciation by this Court involving the privileges and immunities clause which underlines appellants' position and the sensitivity of the issue is found in *Austin v. New Hampshire,* 420 U.S. 656 (1975). There it was held that a state commuter's income tax, which falls exclusively on the incomes of non-residents and is not offset by other taxes imposed on residents alone, was a violation of the privileges and immunities clause. The Court noted:

> The privileges and immunities clause, by making non-citizenship or non-residence an improper basis

[17] "The ownership theory was put at rest," *Brown v. Anderson,* 202 F. Supp. 95, 102 (Alaska 1962).

[18] *See also Kleppe v. New Mexico,* 426 U.S. 529, 545 (1976).

for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism.[19]

Ibid, p. 662.

The Court further stated:

Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the privileges and immunities clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. (emphasis supplied)

Ibid, p. 663.

That integrity is specifically compromised by Alaska Hire.

D. By Analogy Cases Decided Under The Commerce Clause Preclude Alaska Hire.[20]

The particular dangers of discrimination against non-residents based on State ownership of resources has been pointed out by this Court in cases specifically related to

---

[19]"Citizen" and "resident" may here be used interchangeably as the Supreme Court of Alaska recognized that the non-resident appellants were citizens of other states. Juris. App. I, p. 3a.

[20]A commerce clause claim was not directly advanced below. The Alaska Supreme Court ruled, however, that Alaska Hire did not violate the commerce clause:

> Accepting the premise that the United States has and should have one economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Juris. App. I, p. 18a.

oil and gas utilization. In *Oklahoma v. Kansas Natural Gas*, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute which attempted to restrict the export of natural gas from the State. Oklahoma attempted to justify the restriction on the ground that because the resource belonged to the people of the State, and could in fact be left undeveloped by the State, the State was free to impose any restriction it desired on what development did occur. The Court refused to sanction that sort of analysis, commenting that if the statute was allowed to stand, it would grant States powers which would literally destroy the nation. In the Court's words:

> If the States have such power, a singular situation might results. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle. . . . If one State has it, all States have it; embargo may be retailiated by embargo, and commerce will be halted at State lines. In such commerce, instead of the States a new power appears and a new welfare – a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made greater by a division of its resources, natural and created, with every other State and those of every other State with it.

Of similar import is *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The statute before the Court there was a West Virginia provision directed toward keeping within the State all natural gas there produced, which was required for local needs. The Court held that a State could not accord to its own consumers a preferred right of purchase over consumers in other States. *See also Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) and

Takahashi v. California and Game Commission, 334 U.S. 410 (1948), *infra.*

The Supreme Court of Alaska attempted to distinguish these cases because they were decided under the commerce clause. Juris. App. I, p. 18a. But the commerce and privileges and immunities clauses are directly analogous and have similar roots. *See* Discussion of Articles of Confederation, *supra.* They have for the same purpose a national unity, one economic and the other human. Cases involving either are therefore mutually relevant. Justice Douglas' concurrence in Edwards v. California, 314 U.S. 160 (1941), is instructive in this regard. The majority held invalid under the commerce clause a state law making it a crime to assist indigent non-residents to enter the State. Justice Douglas (joined by Justices Black and Murphy) concurred but felt that the case should not have been decided under the commerce clause. "But I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. . . ." *Ibid,* p. 177. Justice Jackson stated in his concurrence:

> But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights. I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or immunities as such.

Ibid, p. 182.[21] This court impliedly recognized the similarity of commerce clause and privileges and immunities interests in *Hughes v. Alexandria Scrap Corporation,* 426 U.S. 794 (1976):

> The [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution. This aspect of the Clause's purpose was eloquently expressed by Mr. Justice Jackson:
>
> > 'Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign states will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. . .' Hood & Sons v. Du Mond, supra, at 539, 93 L.Ed. 865, 69 S.Ct. 657.

Ibid, pp. 807, 808.

Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, (1928) is relevant. It recognized that where Louisiana

---

[21] Because of its facts the privilege and immunity in *Edwards* was of national citizenship. But the same analogy may be drawn with state citizenship. Alaska oil and gas are in commerce and employment discrimination relating thereto should be considered more protected than the commerce itself, not less so. A commerce clause violation therefore establishes *ipso facto* an ancillary privilege and immunity infringement.

laws had declared that the State owned all shrimp within the waters of the State but permitted ultimate sale and shipment of shrimp for consumption outside the state boundaries, the State was accordingly denied the power under the commerce clause to require local processing as a prerequisite to out-of-state transportation. The court specifically noted:

> But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the the shrimp for the benefit of its people.

Ibid, p. 13. The analogy to Alaska Hire is precise and the distinction of the facts from *McCready* clear. By allowing Alaska oil and gas to go into commerce Alaska has relinquished any hold on ownership.

To uphold Alaska Hire will be inviting each State to adopt laws to prefer its own residents in any employment having to do with natural resources. This does not offer a justification for Alaska Hire.

> Nor can discrimination be corrected by retailiation; to prevent this was one of the chiefs ends sought to be accomplished by the adoption of the constitution. *Travis v. Yale and Towne Manufacturing Co.,* 252 U.S. 60, 81 (1920).

The constitutional problem with Alaska Hire and the entire ownership theory is the inherent compromise of federalism. The dissent notes in this regard that:

> Moroever, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska

> Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land. As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. *Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in McCready to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.*
>
> * * *
>
> In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. . . *It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.* (emphasis supplied).

Juris. App. I, pp. 26a, 27a.

II.

ALASKA HIRE IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

Section 1 of the 14th Amendment to the Constitution of the United States provides:

ARTICLE XIV

§1. *Citizenship rights not to be abridged by states.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.[22]

A. Equal Protection

Under the contemporary two-tiered approach to equal protection, as recently discussed by the Court in *San Antonio School District v. Rodrigues*, 411 U.S. 1, 98-110 (1973), legislation discriminating against a suspect class or affecting a fundamental right is subjected to strict scrutiny, requiring the demonstration of a compelling state interest. The means selected to vindicate the State interest should be tailored so as to be the least drastic to classes adversely affected. Appellants believe that as non-residents of Alaska they belong to a suspect class that is

[22]Appellants raised a 14th Amendment claim below. "They allege that it violates both the equal protection and privilege and immunity clause." Juris. App. I, p. 11a.

being discriminated against. The Supreme Court of Alaska rejected any fundamental right argument, Juris. App. I, p. 12a, citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) which established that there is no right to governmental employment.[23]

In *Rodrigues* it was held that a suspect class was one that was "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Ibid*, p. 28. A non-resident in Alaska is powerless to change Alaska Hire as he cannot vote in Alaska. Appellants argue that the privileges and immunities clause of Section 2, Article IV specifically creates and identifies non-residency as a suspect class.[24] Discrimination because of residency is most nearly comparable to discrimination because of alienage, which is a suspect class. On many occasions this Court has held that alienage is a suspect classification, and that any regulation discriminating against such a class is subject to strict scrutiny in an equal protection analysis. *See Graham v. Richardson*, 403 U.S. 365 (1971), *Oyama v. California*, 332 U.S.

[23]While employment may not be a fundamental right under the 14th Amendment, equal access to employment in the common occupations can be said to be such a right. *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) *supra*, and *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 416 (1948) *infra*. *See also C.D.R. v. Board of Education of the City of New York*, 412 F.Supp. 1164 (1976), aff. __ U.S. ____, 97 S.Ct. 721 (1977).

[24]That is not to say that, under the privileges and immunities clause, discrimination against non-residents may be permitted if a strict scrutiny test is withstood. *Austin v. New Hampshire*, 420 U.S. 656, 663 (1975) *supra*. The privileges and immunities clause itself has few exceptions. *The Privileges and Immunities of Citizens in the Several States*, W. J. Meyers, 1 Mich. Law Rev. 286 (1902).

633 (1948), *Sugarman v. Dougall,* 413 U.S. 634, 641 (1973) and cases there cited.

In *Lemmon v. People,* 20 N.Y. 607 (1806), – cited in *Paul v. Virginia,* 8 Wall. 168, 180 (1869), and *Austin v. New Hampshire,* 402 U.S. 656 n. 7 (1975), – Judge Denio at page 608 comments:

> In my opinion the meaning is, that in a given State every citizen of every other State shall have the same privileges and immunities – that, is the same rights – which the citizens of the State possess. In the first place, they are not to be subjected to any of the *disabilities of alienage.* They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of a particular State would be unlawful. (emphasis supplied)

Judge Wright, in the same case, at page 626, states:

> The provision was always understood as having but one design and meaning, viz – to secure the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an *alien* or enemy in the particular sovereignty. (emphasis supplied)

The Supreme Court of Alaska held that the alienage/non-residency analogy was undercut by this Court's opinion in *Mathews v. Diaz,* 426 U.S. 67 (1976). Juris. App. I, p. 14a. *Mathews* is not a 14th Amendment case, it was

decided under the due process clause of the Fifth Amendment. The case concerned a provision of the Social Security Act which granted eligibility for certain medical insurance to resident citizens 65 or over, but denied eligibility to similarly situated aliens unless they had been admitted for permanent residence and has resided in the country for at least five years. The Court held that the equal protection clause was inapplicable as Congress had no constitutional duty to provide aliens with the benefits provided to citizens.

In distinguishing *Graham v. Richardson,* 403 U.S. 365 (1971) *supra,* the Court stated that:

> The equal protection analysis also involves significantly different considerations because it concerns a relationship between aliens and the states rather than between aliens and the federal government.

Ibid, pp. 84, 85.

In language relevant to appellants' argument the Court stated:

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of the State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders,

> Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

Ibid, p. 85.

Mathews supports appellants' position that for equal protection purposes non-residency is directly analogous to alienage. Both are suspect classifications.

In discussing non-resident alienage and the privileges and immunities clause the Court in *Blake v. McClung*, 172 U.S. 239 (1898), commented:

> The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of *alienage* when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established. (emphasis supplied)[25]

Ibid, p. 257.[26]

---

[25] *See also Paul v. Virginia*, 8 Wall. 168, 180 (1869) as cited in *Toomer v. Witsell*, 334 U.S. 395-397 (1948) *supra*.

[26] In speaking of privileges and immunities generally the Court stated:

> This court has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities,' in Article IV of the constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner v. Elliott*, 18 How. 591, 593, said: 'We do not deem it needful to attempt to define the meaning of the word "privileges" in this clause of the constitution. It is safer,

[footnote continued]

In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), issued the same day as *Toomer Witsell*, 334 U.S. 385 (1948), the Court overturned a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship. The decision was made under the equal protection clause of the 14th Amendment. The Court commenced with an historical case analysis here relevant:

> We may well begin our consideration of the principles to be applied in the case by a summary of this Court's holding in Truax v. Raich, 293 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7, LRA 1916D 545, Ann Cas 1917B 283, not deemed controlling by the majority of the California Supreme Court, but regarded by the dissenters as requiring the invalidation of the California law. That case involved an attack upon an Arizona law which required all Arizona employers of more than five workers to hire not less than eighty (80) per cent qualified electors or native-born citizens of the United States. Raich, an alien who worked as a cook in a restaurant which had more than five employees, was about to lose his job solely because of the state law's coercive effect on the restaurant owner. This Court, in upholding Raich's contention that the Arizona law

---

> and more in accordance with the duty of judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.'

Ibid, p. 249.

was invalid, declared that Raich, having been lawfully admitted into the country under federal law, had a federal privilege to enter and abide in 'any state in the Union' and thereafter under the Fourteenth Amendment to enjoy the equal protection of the laws of the state in which he abided; that this privilege to enter in and abide in any state carried with it the '*right to work for a living in the common occupations of the community*,' a denial of which right would make of the Amendment 'a barren form of words.' (emphasis supplied)

Ibid, pp. 415, 416. *See also Toomer v. Witsell*, 343 U.S. 385, 403 (1948), *supra*.

In an attempt to distinguish the supremacy clause aspects of the *Truax* case the California Supreme Court had held that the fishing provision there challenged fell within the rationale of a 'substantial public interest' doctrine. Speaking of the special public interest argument, this Court responded:

It is true that this Court did long ago say that the citizens of a state collectively own 'the tidewaters . . . and the fish in them, so far as they are capable of ownership while running.' The McCready Case upheld a Virginia law which prohibited citizens of other states from planting oysters in a Virginia tidewater river. Though the McCready Case has been often distinguished, its rationale has been relied on in other cases, including Geer v. Connecticut. That decision, where only the commerce clause was involved, sustained a state law that, in order to restrict the use of game to the people of the state, prohibited the out-of-state transportation of game killed within

the state. On the other hand where Louisiana laws declared that the state owned all shrimp within the waters of the state, but permitted ultimate sale and shipment of shrimp for consumption outside that state's boundaries, Louisiana was denied power under the commerce clause to require the local processing of shrimp taken from Louisiana marshes as a prerequisite to out-of-state transportation. In the absence of overriding federal treaties, this Court sustained a state law barring aliens from hunting wild game in the interest of conserving game for citizens of the state against due process and equal protection challenges. Later, however, the Federal Migratory Bird Treaty Act of [July 3] 1918 was sustained as within federal power despite the claim of Missouri of ownership of birds within its boundaries based on prior statements as to state ownership of game and fish in the Geer Case. The Court was of opinion that 'To put the claim of the State upon title is to lean upon a slender reed.' p. 434. We think that same statement is equally applicable here. To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

Ibid, pp. 420, 421 (citations omitted).

The same equal protection argument would be appropriate here. To whatever extent the State of Alaska may

in fact "own" Alaska's natural resources, such ownership is inadequate under the equal protection clause to justify Alaska in preferring its own residents over the residents of other States in any oil and gas related employment.

C.D.R. Limited v. Board of Education of the City of New York, 412 FSupp. 1164 (1976), aff. ___ U.S. ___, 97 S.Ct. 721 (1977), concerned contractors who had employed lawfully admitted resident-aliens and had subsequently been threatened with cancellation of their public contracts on the grounds that their employment of such aliens violated New York labor law. A three judge district court held that when the New York statute granted a preference in employment in building construction projects to citizens over aliens who were lawfully admitted residents, the statute violated the Equal Protection clause of the 14th Amendment. The equal protection language is appropriate for this case:

> The state has a duty to all its lawful residents, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, *and that they have equal access to private employment. Truax v. Raich, supra.* Its duty to reduce unemployment is as much a duty to the alien as to the citizen for the very reasons stated by Mr. Justice Blackmun and Mr. Justice Powell (in *Graham v. Richardson, supra.*).

Ibid, p. 1170.

Even though the *C.D.R.* aliens affected were "lawful residents" (taxpaying, and of a long term), the concept of equality between residents and non-residents is the same within the context of a national unity and purpose for the citizens of all states. A resident alien working in a

State should not have a higher status than a non-resident citizen of a sister State. Indeed, if Alaska Hire is valid, Alaska may discriminate against Washingtonians or Oregonians but not Canadians.

B. Right To Travel.

Alaska Hire also infringes upon the citizens' of the other states constitutionally guaranteed right to travel within the United States. In *Shapiro v. Thompson,* 394 U.S. 618 (1969), a state-imposed durational residency requirement for receipt of welfare benefits was found to be a denial of equal protection as it burdened the right to travel into the State. The Court spoke of the right to travel:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 383 U.S. 745, 757-758, 16 L.Ed.2d 239, 249, 86 S.Ct. 1170 (1966):
>
> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> ". . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States had long been recognized as a basic right under the Constitution." (footnote omitted)

Ibid, p. 631. *See also Memorial Hospital v. Maricopa County,* 415 U.S. 205 (1974), and *Graham v. Richardson,* 403 U.S. at 375-76, *supra.*

In addressing the right to travel argument the Alaska Supreme Court held that:

> A residency requirement does not penalize the right of inter-state migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate. Hence, it is not subject to strict scrutiny on that ground. (Citing *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976)).[27]

Juris. App. I, pp. 11a-12a.

Alaska Hire may no longer burden those who have in fact recently migrated to Alaska to become actual residents and lived there for thirty days. It does inhibit travel to Alaska by the citizens of other States who do not wish to become residents of Alaska or who are undecided. In a transient society citizens of the States may travel throughout the nation looking for places to live and work without necessarily migrating or having any intention of becoming residents of the State in which they seek employment or are working. Such movement, which may properly be termed traveling, is penalized when it is made significantly less likely to find work in Alaska unless resident status is obtained. It is not uncommon for residents of a State to write to prospective employers in another State. Particularly in Alaska, many jobs are secured this way. Meaningful inquiry is now forclosed with respect to oil and gas employment by Alaska Hire.

---

[27] *McCarthy* was a public employment case involving a continuing residency requirement.

In *Shapiro* the Court noted that "[a]n indigent who desires to migrate, resettle, find a new job, and start a new life, will doubtless hesitate if he knows he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence when his need may be most acute." *Ibid,* p. 629. Alaska Hire discourages persons desiring to migrate, resettle, find a new job, or start a new life from even attempting to come to Alaska and find an oil and gas job unless they are willing to make a commitment to residency.

In language appropriate to a privileges and immunities case, the Court stated in *Shapiro:*[28]

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L.Ed. 702, 790 (1849):
>
> > "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Ibid, p. 629.

---

[28] Travel, commerce, and privileges and immunities have not only common roots but have for their common purpose a national unity. *See* Article IV of the Articles of Confederation, *supra.*

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court discussed the limits of permissible State infringement on travel:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel. . . .' While noting the frank legislative purpose to deter migration by the poor, and speculating that '[a]n indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk' the the loss of benefits, the majority found no need to dispute the 'evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements.' Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational residence requirement for voting 'operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.'

Ibid, p. 339-341 (emphasis in original, citations omitted, footnotes omitted).

It is urged that Alaska Hire impermissibly inhibits, burdens, and penalizes the right of citizens to freely travel by institutionalizing discrimination aimed at citizens of sister States.

CONCLUSION

The proper test to be applied is whether Alaska has exercised its power in conformance with the Constitution. It is submitted by appellants that Alaska has not. Alaska Hire significantly compromises the Founders' vision of a national unity.

Wherefore appellants request this Court to reverse the judgment of the Supreme Court of Alaska.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 31st day of December, 1977.

ROBERT H. WAGSTAFF

WAGSTAFF & MIDDLETON
912 W. Sixth Avenue
Anchorage, Alaska 99501

LEE S. GLASS

JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

Counsel for Appellants

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLEES

OFFICE OF THE ATTORNEY GENERAL

RONALD W. LORENSEN
Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811

Counsel for Appellees.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
FACTUAL STATEMENT	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. ALASKA HAS A DIRECT CONTRACTUAL NEXUS WITH THE EMPLOYMENT COVERED BY LOCAL HIRE	6
II. ALASKA MAY ADOPT LOCAL HIRE LEGISLATION TO FOSTER THE WELFARE OF ITS RESIDENTS	8
A. ALASKA HAS A DUTY TO PROVIDE FOR THE WELFARE OF ITS RESIDENTS	8
B. THE ALASKA LEGISLATURE HAS PERFORMED ITS DUTY, IN PART, BY ADOPTION OF LOCAL HIRE LEGISLATION	13
III. LOCAL HIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE	16
A. *McCREADY V. VIRGINIA* HAS NEVER BEEN OVERRULED. THE PRINCIPLE IT UPHOLDS IS STILL THE LAW OF THE LAND	17
1. The *McCready* Principle is Still Viable	18
2. Local Hire is Within the Scope of *McCready*	26
B. EVEN IF McCREADY DOES NOT STATE THE APPLICABLE PRINCIPLE, LOCAL HIRE STILL SATISFIES THE PRIVILEGES AND IMMUNITIES CLAUSE	30
1. There is no Fundamental Privilege or Immunity at Issue in this Case	31

	Page
2. Even if the Hiring Preference at Issue is a Fundamental Privilege or Immunity, Local Hire is Still Sound	32
IV. LOCAL HIRE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	36
A. NON-RESIDENCY IS NOT A SUSPECT CLASSIFICATION	36
B. LOCAL HIRE DOES NOT INTERFERE WITH THE RIGHT OF INTERSTATE TRAVEL	40
C. LOCAL HIRE CLEARLY SATISFIES THE RATIONAL BASIS TEST	45
V. THE STATE'S POWER TO MAKE CONTRACTS IS AN INDEPENDENT BASIS FOR THE VALIDITY OF LOCAL HIRE	46
VI. NEW CLAIMS RAISED BY *AMICI* ARE NOT PROPERLY BEFORE THE COURT, BUT EVEN IF THEY WERE, THEY LACK BOTH SUBSTANCE AND SUPPORT IN THE RECORD	50
A. LOCAL HIRE DOES NOT CONSTITUTE SLAVERY OR INVOLUNTARY SERVITUDE	50
B. LOCAL HIRE IS NOT PRE-EMPTED BY THE NLRA	51
CONCLUSION	52

TABLE OF CASES AND AUTHORITIES

Cases:

	Page
American Yearbook Co. v. Askew, 399 F. Supp. 719 (D.M.D. Fla., 1972), *aff'd mem.* 409 U.S. 904 (1972)	48
Barbier v. Connolly, 113 U.S. 27, 28 L.Ed. 923 (1884)	11

Cases, continued:

	Page
Cafeteria Workers v. McElroy, 367 U.S. 886, 6 L.Ed. 1230 (1961)	48
C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (1976), aff'd mem. sub. nom. Lefkowitz v. C.D.R. Enterprises, Ltd. —— U.S. ——, 50 L.Ed.2d 742 (1977)	12, 15, 16, 38
City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed.2d 511 (1976)	45
City of Oakland v. Burns, 296 P.2d 333 (Cal., 1956)	46
Corfield v. Coryell, 4 Wash. C.C. 371, 6 F. Cas. 546 (C.C.E.D. Pa. 1825)	6, 18, 44
Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491 (1970)	45
Doe v. Bolton, 410 U.S. 179, 35 L.Ed.2d 147 (1973)	28
Douglas v. Seacoast Products, Inc., —— U.S. ——, 52 L.Ed.2d 304 (1977)	9, 24
Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed.2d 274 (1972)	40
Edwards v. California, 314 U.S. 160, 86 L.Ed. 119 (1941)	28, 30
Examining Board v. Flores de Otero, 426 U.S. 572, 49 L.Ed.2d 65 (1976)	15
Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 73 L.Ed. 147 (1925)	14, 27, 28
Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793 (1896)	21, 22, 23
Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534 (1971)	36, 38, 40
Ham v. South Carolina, 409 U.S. 524, 35 L.Ed.2d 46 (1973)	39
Hicklin v. Orbeck, 565 P.2d 159 (1977)	3

Cases, continued: Page

Hughes v. Alexandria Scrap Corporation, 426 U.S. 794, 49 L.Ed.2d 220 (1976) 9, 30, 48

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892) 25

Lemmon v. People, 20 N.Y. 607 (1806) 36

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 55 L.Ed. 369 (1911) 46

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 47 L.Ed.2d 366 (1976) 16, 40

McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1877) ..... *passim*

McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393 (1961) 33, 45

Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306 (1974) 6, 40, 43

Missouri v. Holland, 252 U.S. 416, 64 L.Ed. 641 (1920) 21

Mullaney v. Anderson 342 U.S. 415, 96 L.Ed. 458 (1952) 21

National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245 (1976) 9

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 6, 44

Pennsylvania v. West Virginia, 262 U.S. 553, 67 L.Ed. 1117 (1923) 3, 14, 27, 28

Perkins v. Lukens Steel Co., 310 U.S. 113, 84 L.Ed. 1108 (1940) 48

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973) 6, 10, 19, 36, 39

Cases, continued: Page

Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1969) 20, 40, 41, 45

Slaughterhouse Cases, 16 Wall. (83 U.S.) 36 (1873) 10, 50

Sosna v. Iowa, 419 U.S. 393, 42 L.Ed.2d 532 (1975) 40

State v. Wylie, 516 P.2d 142 (1973) 13

Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1976) 15, 20, 38

Takahashi v. Fish and Game Commission, 334 U.S. 410, 92 L. Ed. 1478 (1948) 23, 38

The Mayor of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) 11

Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948) 4, 10, 21, 22, 32, 33, 34

Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131 (1915) 12, 15, 23, 29

Udall v. Kalerack, 396 F.2d 746 (9th Cir., 1968) 7

Vlandis v. Kline, 412 U.S. 441, 37 L.Ed.2d 63 (1973) 40

Walters v. St. Louis, 347 U.S. 231, 98 L.Ed. 660 (1954) 50

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) 44

Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597 (1976) 39

West v. Kansas Natural Gas Co., 221 U.S. 229, 55 L.Ed. 716 (1911) 3, 14, 27, 28

Williamson v. Lee Optical Co., 348 U.S. 483, 99 L.Ed. 563 (1955) 45

Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669 (1971) 9

Page

United States Constitution:

Article IV, Section 2 ..... 3, 4, 6, 31, 37, 43, 44

10th Amendment 10

13th Amendment 50

14th Amendment 3, 4, 5, 6, 11, 18, 37, 38, 44

Alaska Constitution:

Article VIII, Section 2 ..... 12, 17, 19, 34

Federal Statutes:

15 U.S.C. 719 13

29 U.S.C. 151 et seq. 51, 52

42 U.S.C. 2000e-2 ..... 40, 49

P.L. 85-508, 72 Stat. 399, §6 7

P.L. 93-153, 87 Stat. 576 49

State Statutes:

AS 38.40 ..... 1, 7

AS 38.40.010 ..... 2, 13

AS 38.40.020 ..... 2, 13

AS 38.40.030(a) 47

AS 38.40.030(b) 8, 27

AS 38.40.050(a) 7

AS 38.40.090 2

Other Authorities:

Federal Field Committee for Development Planning in Alaska, "Economic Outlook for Alaska" (1971) 34

Federal Field Committee for Development Planning in Alaska, "Strategies for Economic Development in Alaska" (1971) 34

Federal Field Committee for Development Planning in Alaska, "A Subregional Economic Analysis of Alaska" (1968) 34

Federal Field Committee for Development Planning in Alaska, "Alaska Natives and the Land" (1968) 34

Page

Other Authorities, continued:

House Report No. 624, "Alaska—Admission into Union", 1958 U.S. Code, Cong. & Adm. News, 2933-2956 ..... 7, 35

Hunt and Scott "Debates in the Federal Convention of 1787 Reported by James Madison", Oxford Press (1970) 9

W. J. Meyers, "Privileges and Immunities of Citizens", 1 Mich. Law Review 286 (1903) 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN,
BETTY CLOUD, TOMMY RAY WOODRUFF,
FREDERICK A. MATHERS, HARRY A. BROWNING,
EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department
of Labor of the State of Alaska, and
GUY RICHARD MARTIN, Commissioner of the
Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

BRIEF OF APPELLEES

FACTUAL STATEMENT

In 1972 the Alaska Legislature passed an Act entitled "Local Hire Under State Leases" (hereinafter referred to as "Local Hire" or "the Act"),[1] which is the subject

[1] AS 38.40.

of this suit. The first two sections of the Act set out the Legislature's policy and purpose in these terms:

> Sec. 38.40.010. STATE POLICY. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management.
>
> Sec. 38.40.020. LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are non-recurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state.

The Legislature effected this stated policy and purpose by requiring that State granted oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these contain a requirement that qualified Alaska residents be given a preference in employment arising out of activities generated as a result of the leases, easements, etc.

This suit was initiated by the appellants, none of whom were residents as that term was defined in AS 38.40.090, claiming that Local Hire violated their rights

under the equal protection clause of the 14th Amendment to the United States Constitution and under the privileges and immunities clause of Article IV, Section 2 of the Constitution. The trial court upheld the constitutionality of the Act in its entirety, including a one-year durational residency requirement initially contained in the law. Appellants then perfected their appeal to the Alaska Supreme Court. In its June 3, 1977 opinion, reported at 565 P.2d 159, the Alaska Court struck the law's one-year durational requirement but found that the underlying resident preference was a proper and valid exercise of the State's power: "[t]he natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 17a; 565 P.2d 159, 168-169. The natural resources to which the Alaska Court referred, of course, are those which Alaska owns in the true legal sense. It was not speaking in the more general sense of those natural resources which may be found within the borders of Alaska, irrespective of who has legal title to them.[2]

This appeal followed.

---

[2]This latter useage seems to be the more common. *See*, West v. Kansas Natural Gas, 221 U.S. 229 (1911) and Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In both these cases, a state tried to regulate for local use gas which was found and recovered within its borders, but which it did not own. In spite of the fact that the state did not have any ownership rights with respect to the gas, both opinions speak generally of "Oklahoma's gas" and "West Virginia's gas". See also the discussion in *West* at 255 and quoted by appellants at p. 29 of their brief which speaks of "Pennsylvania's coal", the "Northwest's timber" and the "mining states' minerals". Aside from the fact that *West* and *Pennsylvania* were commerce clause cases, this difference in useage is what renders those cases wholly distinguishable and irrelevant to a constitutional analysis of Local Hire.

SUMMARY OF ARGUMENT

The only challenges to Local Hire which are properly before this Court are appellants' claims that the Act violates the privileges and immunities clause of Article IV, Section 2 of the United States Constitution and the equal protection clause of the 14th Amendment to that Constitution.

As to the Article IV, Section 2 claim, *McCready v. Virginia*, 94 U.S. 391 (1877) states the applicable principle. That case holds that the privileges and immunities clause does not apply to decisions by the states of how the resources which they own are to be used and distributed. *McCready* has never been limited in any relevant manner, and it has never been overruled. A number of more recent cases, such as *Toomer v. Witsell*, 334 U.S. 383 (1948), have rejected expanding the *McCready* principle to encompass state claims of "ownership" based on the fictional common law doctrine that title to *ferae naturae* is in the sovereign. *McCready*, however, involved land owned by Virginia. Local Hire represents a decision by the State of Alaska as to how, if at all, the land and resources which it owns are to be used. The challenged Act therefore falls within the *McCready* principle.

However, even if the *McCready* principle does not encompass Local Hire, the Act still comports with the privileges and immunities clause. There are valid independent reasons for Alaska's adoption of Local Hire, and the degree of discrimination effected by the Act bears an extremely close relation to those reasons. Alaska is using Local Hire as a means of reducing unemployment and upgrading its "human resources." The Act is one of the means Alaska has chosen to carry out both its general duty as a State to provide for the welfare of its people and its specific duty under the

Alaska Constitution to utilize its resources for the maximum benefit of all Alaskans.

Commerce clause cases relied upon by appellants lend no support in attacking either the *McCready* principle or Local Hire. Those decisions all involved state attempts to restrict the flow of a product in interstate commerce and are therefore wholly distinguishable. Local Hire addresses only employment arising out of certain oil and gas-related activities and places no restriction on the use or distribution of the oil and gas. If Alaska's employment preference for residents in certain state-generated activities creates an impermissible "Balkanization" of our Nation, then the many resident preferences in employment arising out of public contracts required by other states are also impermissible.

With respect to appellants' suggestions that Local Hire be subjected to the strict scrutiny test under the equal protection clause of the 14th Amendment, there is neither precedent nor rational justification for doing so. Classifications based on residence/non-residence have been approved frequently by the Court without applying strict scrutiny. The fact that classifications discriminating against *alien residents* of a state are treated as "suspect" provides no basis for treating classifications based on non-residency as "suspect" for purposes of equal protection analysis. This Court has never held that non-residency is a "suspect classification."

Appellants' claim that Local Hire violates a non-resident's fundamental right to interstate travel is equally without precedent. That claim is apparently based on a misunderstanding of the nature of the right to travel which this Court has found to be "fundamental" for purposes of equal protection analysis. The

Constitution protects two different rights to travel. The first, the right to travel casually or to move about, is protected by the privileges and immunities clause of Article IV, Section 2. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). The second is the right to migrate – to move one's domicile from one state and resettle in another. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Because a change in domicile means a change in state citizenship, Article IV, Section 2 does not reach that right, and it is therefore protected by the 14th Amendment. While both rights of travel have been described as "fundamental," only the right to migrate is treated as "fundamental" for purposes of invoking strict scrutiny. The number of rights viewed as "fundamental" under the equal protection clause is quite limited, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), whereas all rights protected by the privileges and immunities clause are described as "fundamental" in cases involving Article IV, Section 2. *Corfield v. Coryell*, 4 Wash. C.C. 271, 6 F.Cas. (C.C.E.D. Pa. 1825). This Court has never said the right to travel casually while retaining one's domicile in one state is a "fundamental right" calling for strict scrutiny under the equal protection clause.

ARGUMENT

I.

ALASKA HAS A DIRECT CONTRACTUAL NEXUS WITH THE EMPLOYMENT COVERED BY LOCAL HIRE.

It is essential at the outset to keep clear what this Act involves. Local Hire does not apply to all private employment in the state; it does not even apply to all private oil and gas employment in the state. It applies *only* to that oil and gas-related employment which arises from "oil and gas leases, easements, or right-of-

way permits for oil or gas pipeline purposes, unitization agreements or renegotiation of any of the preceding *to which the state is a party* after July 7, 1972." AS 38.40.050(a) (emphasis added). The State, then, must have a direct proprietary and contractual nexus to the covered employment. The provisions of AS 38.40 come into operation only when the State grants a leasehold or similar interest in land which it owns.[3]

Application of the Act is further conditioned as follows:

> [T]he activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. AS 38.40.050(a)

Finally, Local Hire does not even bar non-residents from that employment which is subject to the Act. The Act only requires that Alaska residents who are

---

[3]At the time of Statehood on January 3, 1959, approximately 99% of all land within the borders of Alaska was owned by the federal government. In becoming a state, Alaska was granted and became entitled to select, under the provisions of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 399, Sec. 6, nearly 103,000,000 acres of those federal lands (approximately one third of the total federal holdings). The purpose of those land grants was to serve Alaska's overall economic and social well-being. *Udall v. Kalerack*, 396 F.2d 746 (9th Cir., 1968). See also House Report No. 624, "Alaska – Admission into Union", 1958 U.S. Code. Cong. & Adm. News 2933-2956. The selection process is not yet complete, but since 1959 large portions of land have been conveyed to the State, in fee, by the federal government; full title to those lands and the minerals and other resources on and below them is vested in the State.

available and qualified to do the work be hired before non-residents. AS 38.40.030(b). The Act imposes no penalty for coming to Alaska. In fact, as to those who consider exercising their constitutional right to inter-state migration by traveling to Alaska and taking up residence, it provides a clear incentive. However, the Act does not guarantee anyone that they will get a job. At best, Local Hire provides only an inchoate expectation of employment in activities which are the result of public oil and gas leases.

II.

ALASKA MAY ADOPT LOCAL HIRE LEGISLATION TO FOSTER THE WELFARE OF ITS RESIDENTS.

A. Alaska Has A Duty To Provide For The Welfare Of Its Residents.

Despite the fears of appellants that, if Local Hire is upheld, "Balkanization" of our great Nation is imminent,[4] we must point out that the United States is not one large state. Rather, it is a union of independent and sovereign states, each with full power and authority to conduct and regulate its internal affairs, consistently, of course, with those powers vested in the federal

---

[4]If the inevitable result of certain employment preferences for residents is "Balkanization", then surely the resident preferences created by numerous states for employment by private contractors on public construction and/or procurement activities already must have led to such a condition. Most of those laws have been in existence for quite some time. See for example, Alabama §39-3-2; Arizona §34-302; Arkansas §14-607; Colorado §8-17-102; Delaware 29 §6913; Idaho §44-1001; Illinois 48 §271; Massachusetts 149 §26; Montana §41-701; New Jersey §34:9-2; New Mexico §5-1-5; New York Labor Laws §222; Oklahoma 61 §10; Pennsylvania 43 §154; Nevada §338.130; South Carolina §1-1-460; South Dakota §5-19-5 and 5-19-6; Washington RCW 39.16.005. This listing represents a casual search of available statutes and is not exhaustive.

government by the Constitution. This is our system of federalism,[5] founded as it is on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

---

[5]The nature of our "system of federalism" is probably open to some debate. We think it can be fairly said that the concept of federalism, as reflected by this Court's approach to the balance of federal vs. state authority since the adoption of the Constitution, has undergone some fluctuations. This Court only last year indicated this balance – this federalism – is largely one of policy. Douglas v. Seacoast Products, Inc., ____ U.S. ____, 52 L.Ed.2d 304, 320 (1977). Two other recent decisions of this Court lead us to the conclusion that our system of federalism as currently outlined by the Court recognizes a relatively broad scope of authority in the states, restricted only by the clear grants of power to the federal government by the Constitution and by the limitations on state action contained in the Constitution. National League of Cities v. Usery, 426 U.S. 833 (1976); Hughes v. Alexandria Scrap Corporation, 426 U.S. 794 (1976).

Contrary to appellants' conclusions on the subject, Appellants' Brief, p. 12, n. 7, the concept of federalism as it was initially reflected in the new Constitution led to considerable debate before that document was finally ratified. After the Framers adopted and signed the Constitution it was presented in each state to a convention of delegates for ratification on behalf of that state. All thirteen states eventually ratified the Constitution. However, seven of them (in the order of ratification: Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island, see Hunt and Scott, "Debates in the Federal Convention of 1787 reported by James Madison", Oxford Press (1970)) included as a formal part of their ratification document a "recommendation", "declaration" or "proposal" expressing their view that the Constitution should not be read as implying that Congress had any powers beyond those specifically enumerated and that all other powers not expressly relinquished by them and vested in the federal government through the Constitution were reserved to the states.

[footnote continued]

In 1837, this Court described the authority and duty of the states as follows:

> We . . . plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered to or restrained by the Constitution of the United States. That, by virtue

---

Clearly, there was considerable concern on the part of the states which had undertaken to create this Union that, as drafted, the Constitution would be interpreted as denying to them powers which they felt should be retained, even under one national government. In response to those concerns, the First Congress proposed twelve amendments to the Constitution. The resolution submitting the amendments began as follows:

> The Convention of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benificent ends of its institutions:

Id. The twelfth proposed amendment read:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Id. That proposal, of course, was adopted as the Tenth Amendment to the Constitution. The adoption of this and the other 10 original amendments to the Constitution has been characterized by this Court, through Mr. Justice Miller, as showing "a prevailing sense of danger at that time from the federal power." Slaughterhouse Cases, 16 Wall. (83 U.S.) 394, 410 (1873). It is for these historical reasons that Constitutional challenges to the exercise of state authority must always be evaluated in conjunction with the Tenth Amendment. Toomer v. Witsell, 334 U.S. 385, 407 (1948) (Frankfurter, J., concurring). See, also San Antonio Independent School District v. Rodriguez, *supra*, at 44.

> of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation or what may, perhaps more properly be called internal policie, are not thus surrendered or restrained; and that, consequently, in relation to these the authority of a State is complete, unqualified and exclusive. *The Mayor of the City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 104.

In 1884, Mr. Justice Field, speaking for this Court on the effect of the 14th Amendment on matters within a State's sovereignty, said:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and the good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, *Barbier v. Connolly*, 113 U.S. 27, 28 L.Ed. 923, 925.

These precepts have not diminished over the intervening years:

> *The state has a duty to all its lawful residents*, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, and that they have equal

> access to private employment. *Truax v. Raich, supra. Its duty to reduce unemployment* is as much a duty to the alien as to the citizen . . . *C.D.R. Enterprises, Ltd. v. Board of Education*, 412 F. Supp. 1164, 1170 (1976), *aff'd mem. sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd.*, ____ U.S. ____, 50 L.Ed.2d 742 (1977) (emphasis added)[6]

But in addition to the general duty imposed on it as one of the several states within our federal system, the Alaska Legislature has an expressly stated constitutional duty to assure that its natural resources are developed and utilized for the benefit of its people:

> The legislature shall provide for the utilization, development, and conservation of all natural resources *belonging to the State*, including land and water, *for the maximum benefit of its people.* Alaska Const., Art. VIII, §2 (emphasis added)

Alaska, then, has the dual obligation to provide for the welfare of its residents and to develop its natural resources for the benefit of Alaskans. Local Hire is directed toward satisfying both of those obligations.[7]

---

[6]In *C.D.R. Enterprises*, New York State carried out its "duty to reduce unemployment" by requiring that New York residents be given a preference in employment on public construction projects. The federal district court upheld the validity of that preference once the law's exclusion of aliens who were residents of New York was struck. This Court affirmed that decision without opinion.

[7]Appellants have yet to assert that the State has no duty to provide for the welfare of its residents, or that it may not effect this duty by discriminating in their favor.

B. The Alaska Legislature Has Performed Its Duty, In Part, By Adoption Of Local Hire Legislation.

Implicit in the Alaska Legislature's duty to provide for the welfare of the State's people must be the authority to implement programs to meet that duty. AS 38.40.010 and 38.40.020, set out in full at p. 2, express the Legislature's stated policy and reasons for adopting Local Hire. From these provisions it can be seen that the State sought to guarantee that the land it owned and the natural resources on and below it, as the common property of its people, would be developed and used to provide the maximum benefit and return to those people. Accomplishing this purpose meant more than simply building new schools and highways with gas and oil-generated tax receipts and royalty rights. It included, as well, assuring that the State's natural resources (those which it owns) are similarly utilized, if at all,[8] in the interest of its people, individually and collectively, toward the end of benefiting Alaska's society and economy overall – "reducing unemployment and 'upgrading Alaska's human resources'."[9]

---

[8]As to natural resources owned by the State, the *only* group which could require that any State-owned resources be developed is the Alaskan people. Notwithstanding appellants' reference in their brief at p. 19 to the Alaska Natural Gas Transporation Act of 1976, 15 U.S.C. 719, Alaska is the exclusive owner of all minerals on or below lands owned by her until such time as she leases those lands for development and extraction of those minerals.

[9]The Alaska Supreme Court has said that "reducing unemployment and 'upgrading Alaska's human resources' " is a compelling governmental interest for purposes of the equal protection strict scrutiny test. State v. Wylie, 516 P.2d 142, 149-150 (1973). Despite the existence of such an interest in that

[footnote continued]

Despite the clear language of the Act, however, appellants have yet to focus properly on the application and effect of Local Hire. They place heavy reliance on three commerce clause decisions dealing with the efforts of certain other states to restrict the availability of natural resources produced within those states, *West v. Kansas Natural Gas, supra; Pennsylvania v. West Virginia, supra;* and *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1925). The attempted state action in those cases, however, bears no resemblance to Local Hire. Alaska's Act places no restriction on the product or its transportation; it deals only with employment. Further, Local Hire applies only to oil and gas-related property owned, in a proprietary sense, by the State of Alaska and not, as was the case in *West* and *Pennsylvania,* to all natural resources of a specific kind (natural gas) within the state's borders, publicly or privately held. Finally, the Act establishes the resident employment preference provisions as a necessary condition of any oil and gas lease, right-of-way permit, or the like granted by the State.

The State's nexus with the subject matter it is regulating is, therefore, very real and direct. It arises

---

case, however, it struck the one-year durational residence requirement imposed by the State for purposes of an employment preference in State hiring on the grounds that the one-year requirement was not sufficiently tailored to accomplish the valid interest. The Court below followed the same approach in invalidating the one-year durational requirement originally adopted as a part of the Local Hire Act. Contrary to appellants' apparent position at page 7, n. 7 of their brief that the Alaska Court rejected characterizing Local Hire as an attempt to solve social, racial, educational, and economic problems, the Court did not do so. It merely stated that it saw no need to characterize the Act's purpose since the principle on which it relied in upholding the Act did not require such a finding.

out of *ownership* and is not based simply on some general attribute of sovereignty authorizing the State to exercise control over the business decisions of private employers or the resources found within its borders. The proposition that a state may regulate the use of the resources which it, on behalf of its people, owns was clearly acknowledged by this Court in *Truax v. Raich*, 239 U.S. 33 (1915). In that decision – which struck down, as a denial of equal protection to resident aliens, an Arizona statute which required that *all* private employers of five or more workers employ at least 80 per cent United States citizens – Mr. Justice Hughes, speaking for the Court, said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.

Id. pp. 39, 40.[10] The Arizona law lacked the necessary nexus to permit that state to regulate, across the board, the composition of the workforce in the private sector. Local Hire is grounded upon precisely that necessary nexus found absent in *Truax.*

Appellants ignore the fact that the resident preference to which they so strongly object applies only to

---

[10]Recent decisions of this Court treating alienage as a suspect classification for purposes of equal protection analysis, *e.g.*, C.D.R. Enterprises, Ltd. v. Board of Education, *supra;* Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1976), cast substantial doubt on the continuing validity of this holding as it applied to aliens who were residents of Arizona. However, the underlying proposition that a state may limit the "enjoyment" of its resources to its people has yet to be rejected.

employment opportunities which would not even exist were it not for the State's granting oil and gas leases and pipeline rights-of-way. In a very real sense this is employment which owes its very existence to the State. As such, it is on exactly the same footing, constitutionally, as residence requirements in public employment and public construction contracts. *E.g.*, *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976);[11] *C.D.R. Enterprises, Ltd. v. Board of Education, supra*; and n. 4, *ante*.

Local Hire does no more than limit the distribution of the State's resources and property (those which it owns) and interests in them in a manner which is designed to assure maximum "enjoyment" to Alaskans.

III.

LOCAL HIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

The privileges and immunities clause of Article IV, Section 2 of the United States Constitution does not apply, and was never intended to apply, to decisions by a state as to how it would permit, if at all, the use and distribution of the natural resources to which it has title. As we shall show, nothing in appellants' brief undercuts, in any way, the validity and vitality of that proposition, and the employment preference under Local Hire is fully within its scope.

However, even if the regulation by a state of *employment arising out of* the use of its natural resources is not a proper adjunct of the state's power to

[11] *McCarthy* did not involve simply a resident *preference* in employment. Philadelphia required residency as a *condition* of continuing, as well as initial, employment.

regulate and control those resources, it must still be shown that the Act involves a "fundamental" privilege or immunity as that term is used in privileges and immunities analysis. Additionally, even if that can be shown, appellants must still demonstrate that there are no valid reasons for the discrimination and that, even if the reasons are valid, the discrimination does not bear a close relation to those reasons. Appellants cannot make such a showing – they have not even attempted it.

A. *McCready v. Virginia* Has Never Been Overruled. The Principle It Upholds Is Still The Law Of The Land.

In upholding Local Hire against appellants' attack under the privileges and immunities clause, the Alaska Supreme Court stated that it was relying on the "natural resources exception" to the clause recognized by this Court in *McCready v. Virginia, supra*. The Court reasoned as follows:

> *McCready v. Virginia, supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, Section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Op., Appendix I, Appellants' Jurisdictional Statement, pp. 17a; 565 P.2d at 168, 169.

1. The McCready Principle is Still Viable.

McCready involved a privileges and immunities attack on Virginia's restricting solely to its own citizens the use of the land beneath its navigable waters for the purpose of planting and growing oysters. This Court rejected that attack and upheld the Virginia statute, indicating that the privileges and immunities clause had no application to state restrictions which were, "in effect, nothing more than a regulation of the use by the People of their common property." The Court then went on to say:

> [W]e think we may safely hold that the citizens of one state are not invested by this clause of the Constitution with any interest in the common property of the citizens of another state.

Id., p. 396.

In reaching its decision, the Court had looked to the opinion of Mr. Justice Bushrod Washington, while on circuit, in the case of *Corfield v. Coryell, supra*, for his exposition on the scope of the privileges and immunities clause. In a portion of the *Corfield* decision which has been much quoted by this and numerous lower Courts throughout the land, Justice Washington outlined the nature of those privileges and immunities which he considered "fundamental" to the citizens of all free governments.[12] But Mr. Justice Washington's

---

[12]It is clear from a reading of *Corfield* and cases decided by this Court since *Corfield* that the "fundamental right" analysis under the privileges and immunities clause encompasses a far broader range of individual rights than those which this Court has described as "fundamental" for purposes of determining whether strict scrutiny is the applicable test for analyzing challenged state action under the equal protection clause of the 14th Amendment. Those rights which are "fundamental" for

[footnote continued]

discourse went beyond the language so oft-quoted by the Courts and now by appellants and conditioned it with the following in the very next paragraph:

> But we cannot accede to the proposition which was insisted on by the counsel that, under this provision of the constitution, [Art. IV, Section 2] the citizens of the several states are permitted to participate in all *the rights* which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.

Id., at 381 (Emphasis in the original.) On the following page, Mr. Justice Washington restated the principle as follows:

> [T]his right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states.

Id., at 382.

The principle that a state may regulate the use of state property to the advantage of its residents without

---

purposes of equal protection analysis are quite limited in number. San Antonio Independent School District v. Rodriguez, *supra*, at 31-39. That this difference in the useage of the term "fundamental right" exists appears to have been missed by both the appellants and the National Legal Right to Work Defense Foundation in its proposed brief *amicus curiae*.

extending similar advantages to the residents of the other states, first articulated by Mr. Justice Washington and later adopted by this Court in *McCready*, has never been overruled or even limited in any manner relevant to Local Hire.[13] The Alaska Supreme Court relied on that principle in this case, and its reliance was both justified and correct. Faced with the clear application of *McCready*, appellants have no choice but to assert that the *McCready* "exception"[14] is no longer good law. In support of that assertion, they point to a number of decisions of this Court which, in their view, indicate that this Court has severely limited, or perhaps even overruled, the principle upon which *McCready* was founded.

[13]As pointed out, *ante*, at n. 10, the Court has in recent years refused to apply the *McCready* principle to state discriminations against aliens who are residents of the state. *Sugarman, supra;* Shapiro v. Thompson, 394 U.S. 618 (1969). Local Hire benefits all Alaska residents, citizen and non-citizen, alike. None of this Court's decisions dealing with alienage indicate in any way that the *McCready* principle is no longer acknowledged.

[14]Although over the years the Court's decision in *McCready* has been regularly described by the Courts and commentators as creating an "exception" to the privileges and immunities clause, it seems to us that the better analysis is to characterize the decision as declaring that the privileges and immunities clause did not apply, and was never meant to apply, to decisions by the states as to how they would permit, if at all, the use and distribution of the natural resources which they own, *i.e.*, the common property of the people of the state. Alternatively, *McCready* can be characterized as stating that sharing in the regulation and distribution of the resources of a given state is not a privilege or immunity of citizens in the several states. This was the approach taken by W.J. Meyers in "Privileges and Immunities of Citizens", 1 Mich. Law Review 286, 298-300 (1903). Under either approach, we suggest that describing the *McCready* principle as an "exception" is not really accurate.

A review of the cases cited by appellants demonstrates that those decisions do not support their position. Most of the cases involved states' attempts to justify their discriminatory actions on the ground of a general claim of "ownership" based on the old common law fiction that the sovereign is the owner of *ferae naturae.* That type of proprietary claim had been recognized by this Court in *Geer v. Connecticut*, 161 U.S. 519 (1896), in spite of a vigorous dissent by Mr. Justice Field arguing that the common law doctrine was insufficient to permit the state to attempt to control the commerce of killed wildfowl "where the state has never had the game in its possession or under its control or use." *Id.*, at 539. This Court then subsequently refused to extend the application of the common law ownership fiction to wild fowl which clearly migrated across both state and national boundaries. *Missouri v. Holland*, 252 U.S. 416 (1920). As expressed by Mr. Justice Holmes in *Missouri*, for a state to rely on a fictional common law claim of title was "to lean upon a slender reed. Wild birds," he said, "are not in the possession of anyone; and possession is the beginning of ownership." *Id.*, at 434.

In *Toomer v. Witsell, supra*, this Court refused to apply the *McCready* principle to South Carolina's claim of ownership of the free-swimming fish in its marginal sea. That state had also relied on the common law "ownership" fiction as the basis for its claim. Lacking ownership, South Carolina simply had an insufficient interest in (nexus with) the fish to invoke *McCready* as authority for an excessively discriminatory commercial fishing license fee which was 100 times higher for non-residents ($2500) than for residents ($25).[15]

[15]Mullaney v. Anderson, 342 U.S. 415 (1952) was another case involving a license differential between resident and

[footnote continued]

McCready simply was not applicable. The Court described the ownership theory as "a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." *Id.*, at 402. *The ownership theory* – the common law doctrine recognized in *Geer* that title to *ferae naturae* is in the sovereign – was viewed in *Toomer* as a fiction. That analysis in no way limited the basic principle of *McCready* that the common property of the people, *i.e.*, the property actually owned by the state, may be used and distributed in a manner which will provide a benefit only to the people. As Mr. Justice Frankfurter noted in his separate concurring opinion:

> It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.

---

non-resident commercial fishermen. However, no mention of *McCready* is ever made in that decision in which the Court simply followed *Toomer* in holding the differential unconstitutional. Considering the *de minimus* difference in the license fees compared with that in *Toomer*, it appears the reason the differential was invalidated was the Territory of Alaska's failure to provide any evidence justifying it and not because the differential was excessive as in *Toomer*.

When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391. The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the *McCready* doctrine by referring to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax v. Raich*, 239 U.S. 33, 39-40.

Id., at 407-409.

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), another case cited by appellants, rejected California's claim to ownership of the fish in its marginal sea as a sufficient basis for its discriminating against certain aliens who were residents of California in the issuance of commercial fishing licenses. While again describing the common law ownership theory as a fiction, the Court expressed no opinion as to the viability of the *McCready* principle (the privileges and immunities clause not being at issue), except to say "[t]hough the *McCready* case has been often distinguished, its rationale has been relied on in other cases, including *Geer v. Connecticut.*" *Takahashi*, at 421.

Douglas v. Seacoast Products, Inc., *supra*, decided by the Court just last May, is also relied on by the appellants. In that case the Court held a Virginia statute which prohibited non-residents from catching certain fish in Virginia waters to be pre-empted by federal law.[16] Virginia had attempted to counter the pre-emptive effect of the federal statute by arguing that it owned the fish in its territorial waters. The Court refused to recognize that fiction of ownership stating, "[a] State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals." *Id.*, at 319. Here again, what the Court rejected was the common law doctrine of sovereign ownership of *ferae naturae*. It did not address the *McCready* principle since the privileges and immunities clause was not at issue.[17]

Nothing in *Douglas* or any of the other cases cited by appellants undercuts the vitality and continued validity of the *McCready* principle. The essential

[16]The Court specifically pointed out that *McCready* was factually distinguishable because no claim under a preemptive act of Congress had been asserted in that case. *Id.*, at 320, n. 21. Mr. Justice Rehnquist, joined by Mr. Justice Powell, concurring in part and dissenting in part, also pointed out that *McCready's* validity was not being disputed. It appears that appellants' reliance on certain of the "patchwork of broader language" which the Court "embroidered" on its pre-emption holding in *Douglas* is just the sort of result of that language which Mr. Justice Rehnquist warned against in his separate opinion. *Id.*, at 321.

[17]By way of *dicta* the Court discussed in *Douglas* the implications of its holding on policy considerations relating to federalism, but the concern it addressed – the potential "Balkanization" of interstate commercial activity – is a commerce clause issue and is not a subject for the privileges and immunities clause. This latter clause is concerned with certain rights of individuals and not with interstate economic activity.

difference between *McCready* and each of the above-discussed cases is obvious. *McCready* involved Virginia's actual ownership of *land*, albeit under water.[18] On the other hand, all of these later cases which supposedly undercut the *McCready* decision involved fictional common law claims of ownership of wildlife[19] – and wildlife which *migrated* across state borders, at that. Stated another way, these other cases stand for the proposition that where title to the natural resource is questionable, at best, the state may not assert the speculative claim of "ownership" as a basis for discrimination against non-residents. The converse of that proposition is that where title to a natural resource is both clear and ascertainable that state may assert its clear claim of ownership, in fact, as the basis for discrimination in favor of its residents. As in *McCready*, Alaska's claim that it may provide an employment preference in the development of those natural resources to which it has title does not rest on such a "slender reed" as its fictional ownership of wild animals. Alaska's claim is as solid and real as the land on which the Trans-Alaska Pipeline is built.

[18]In this regard, Alaska's claim is even stronger. While a state holds title to its submerged lands under navigable waters and may dispose of its interest in that land, it may only do so in a manner which will not impair the public's interest in the waters and subject to the right of Congress to control navigation on the waters for the regulation of commerce. Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892). There is no similar restriction on Alaska's authority to dispose of the fast land to which it has title.

[19]It appears that this case is the first privileges and immunities case involving a state's regulating the distribution or use of *land* which it owns in favor of its residents to be decided by this Court since *McCready* in 1877.

Nothing in the cases cited by appellants limits, much less overrules, the continuing validity of what the dissenting justices of the Alaska Supreme Court referred to as "an antiquated line of authority." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 23a; 565 P.2d at 171. We grant that the principle established in *McCready* dates back to the times in which our Constitution was written. However, the fact that it was first articulated so shortly after our Nation was founded is the basis for its strength and not for any present-day weakness. Our Nation now, as then, is still made up of individual states, each charged with the primary duty of caring for the welfare of its own people. The *McCready* "line" helps establish the scope of the States' authority to carry out that duty.

2. Local Hire is Within the Scope of McCready.

Appellants rely on a number of commerce clause cases in arguing that the *McCready* principle does not extend to employment which arises as a result of the State's regulating the use and development of the resources which it owns on behalf of its people. None of appellants' cases, however, stands for or even hints at such a proposition.

Certainly the State could not regulate the employment arising from the development of its resources in a manner which would interfere with interstate commerce in those resources, but appellants have never advanced such a claim. However, even if that claim had been raised, it has no likelihood of success. Local Hire places no restrictions on the exploitation, transportation or distribution of the natural resource. Further, the Act does not require the employment of any individual who is unqualified to perform the work, and it provides an

exception for the employment of key executive, professional and administrative personnel. AS 38.40.030(b). Certainly, there is nothing in the record even intimating any kind of interference with interstate commerce.

It is because Alaska Hire does not create (and is not claimed to create) any interference with interstate commerce in oil and gas that appellants' continued reliance on certain commerce clause decisions of this Court is simply misplaced. In each of those cases, *West v. Kansas Natural Gas, supra, Pennsylvania v. West Virginia, supra*, and *Foster Fountain Packing Company v. Haydel, supra*, a state had attempted to regulate, for its own advantage, the use and distribution of a natural resource at a point at which that resource had already become a product in interstate commerce. As pointed out *ante* at n. 2, in both *West* and *Pennsylvania* the states tried to base their authority to regulate the resource on the general assertion that it was the state's gas – not because the state had any ownership in the gas, in fact, but simply because the gas was extracted within the state's borders. In *Foster Fountain Packing* the State of Louisiana had a statute which declared that shrimp within its territorial waters were the property of the state and prohibited the shipment of any raw shrimp taken within the state. However, the state did permit the shipment of canned shrimp from the state. The effect of the Louisiana law, then, was to restrict, but not prohibit, the distribution in interstate commerce of shrimp after they had been reduced to possession by private persons. In holding the state's regulation of the shrimp industry unconstitutional under the commerce clause, the Court acknowledged that "[a]s the representative of its people, the state might have retained the shrimp for consumption

and use therein." *Id.*, at 13. However, the Court found that Louisiana had relinquished its hold over the shrimp by permitting it to be shipped in interstate commerce and, therefore, its authority to control the processing and distribution of the product had been terminated.

West, *Pennsylvania*, and *Foster Fountain Packing*, then, are wholly distinguishable from the case now before the Court. Those cases were decided on commerce clause grounds and involved state attempts to restrict the distribution of natural resources found within their borders.[20] They did not involve employment arising out of the development of state owned resources. Local Hire, on the other hand relates only to such employment and does not restrict in any way the use, distribution or exploitation of any oil and gas found in Alaska. Since they are so clearly distinguishable, appellants' cases provide no basis for overruling *McCready* or holding that Local Hire violates the privileges and immunities clause.[21]

---

[20] In this regard, see also Doe v. Bolton, 410 U.S. 179 (1973), involving a privileges and immunities claim in which Georgia law provided that only state residents could obtain abortions in any hospital in Georgia. The residency requirement applied to both public and private hospitals in the state. It was on that basis that the requirement was struck as unconstitutional, the Court noting that it was "not based on any policy of preserving state-supported facilities for Georgia residents", *Id.*, at 200. This implies that a restriction of access to state-supported or state-funded hospitals might have been permissible.

[21] Edwards v. California, 314 U.S. 160 (1941), cited by appellants, also provides no basis for invalidating Local Hire. *Edwards* was a commerce clause decision which struck down as unconstitutional a California law making it a crime for a person to bring or transport other persons who were indigent non-residents into the state. A majority of the Court treated the

[footnote continued]

Appellants have not cited any cases which address a state's authority to regulate employment generated from the exploitation, use, and distribution of natural resources which it owns. Alaska only requires that, in allocating a limited number of certain natural resources-related employment opportunities (which would not even exist except for the State's action in permitting development of these resources), employers must give an employment preference to qualified Alaskans. We believe that the authority to require such a preference, without erecting a barrier to any non-resident who wishes to travel to Alaska and without limiting in any way the use or distribution of the *product*, is a necessary and proper incident of the State's authority and duty to manage its resources for the "maximum enjoyment" of its people. This is certainly the implication contained in the Court's decision in *Truax*, supra. As is true of Local Hire, *Truax* involved state action seeking to affect the composition of the workforce in a portion of the private sector. However, unlike Local Hire, the action did not "pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens." *Id.*, at 39, 40.

Alaska Hire is wholly within the scope of the *McCready* principle. As such, the *McCready* "excep-

---

law as a commerce clause issue because it penalized the *act* of transporting another across state lines – it did not penalize the indigent person who was transported. The Court pointed out the law's "express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and

[footnote continued]

tion," whatever its precise legal nature,[22] insulates Local Hire from attack under the privileges and immunities clause.[23]

B. Even If McCready Does Not State The Applicable Principle, Local Hire Still Satisfies The Privileges and Immunities Clause.

Even if the Court concluded that Local Hire is not within the *McCready* principle or overruled *McCready*,[24] that would not, as appellants suggest, determine the constitutionality of Local Hire under the privileges and immunities clause. Those who challenge the Act still must demonstrate that the law affects a "fundamental"

---

immediate; it is the plain and sole function of the statute." *Id.*, at 174. The Court was not willing to permit California to shut its gates to the outside world in that fashion. *Edwards* is clearly distinguishable from the case now before the Court. Local Hire does not prohibit bringing anyone into the State; it merely provides for a preference in certain employment to residents. As such there is no basis for a commerce clause claim against the Act. The Alaska Supreme Court considered *Edwards* and found that the decision did not compel invalidation of Local Hire. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 18a; 565 P.2d 169.

[22]See note 14, ante.

[23]Just as the Court concluded in Hughes v. Alexandria Scrap Corp., supra, that nothing in the commerce clause "forbids a state from, in the absence of Congressional action, participating in the market and exercising the right to favor its own citizens over others", *Id.*, at 810 (footnote omitted), so too, the privileges and immunities clause was not intended to forbid a state from exercising "the right to favor its own citizens over others" by requiring a preference for residents in employment in a job market which it has created.

[24]Presumably either holding would also apply to the various states' resident preference requirements for employment in activities arising out of public works contracts let by the states and their political subdivisions. See n. 4, *ante*.

privilege or immunity and that there are no valid reasons for the discrimination. Local Hire is constitutionally sound under both tests.

1. There is no Fundamental Privilege or Immunity at Issue in this Case.

A reading of appellants' brief fails to disclose precisely what fundamental privilege or immunity of the citizens of Alaska is denied to non-residents by Local Hire. By simple logic, though, it follows that the privilege at issue must be the hiring *preference* in certain State-generated employment where the number of jobs available is less than the number of applicants for them. Is this a fundamental privilege of Alaska citizenship? We think not. This employment preference does not involve a "disability of alienage" or the right to pass into Alaska for any purpose, to acquire real property, to maintain actions in the State's courts, or to be exempt from higher taxes or excises than those imposed on residents. It is not a basic civil right which the State must in some manner grant or recognize. The Legislature could repeal the preference tomorrow and no Court would support a claim by a resident that he had been deprived of a vested property right without due process of law.

Obviously the manner in which the employment preference under Local Hire is characterized could have a bearing on whether this Court will recognize it as "fundamental" for purposes of Article IV, Section 2, analysis. Unfortunately, appellants have failed to characterize it in any manner whatsoever. Presumably they will attempt to state it in their reply brief. If they do, our point is simply that articulation of any specific right or privilege is not, in itself, sufficient to establish

that it is "fundamental" for purposes of privileges and immunities analysis. Whether it is will depend upon how substantively important the Court views the claimed right to be.

2. Even if the Hiring Preference at Issue is a Fundamental Privilege or Immunity, Local Hire is Still Sound.

A finding that Local Hire denies non-residents a fundamental privilege or immunity enjoyed by Alaska residents still would not determine the Act's validity under the privileges and immunities clause. As the Court stated in *Toomer, supra:*

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the *many situations* where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the discrimination bears a close relation to them.

Id., p. 396 (footnote omitted, emphasis added). The Court went on to express the following caveat:

> The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Id.

These two passages, taken together, state the contemporary test for analyzing resident/non-resident

discriminations under the privileges and immunities clause. Appellants provide no argument or analysis on the test whatsoever, leaving it wholly to us to justify a law which is entitled to the presumption of constitutionality. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). We will demonstrate that Local Hire withstands the scrutiny called for by *Toomer.*

The *Toomer* test is essentially two-pronged and may be restated as follows:

> 1. Are there valid independent reasons for the disparity of treatment?
>
> 2. Does the degree of discrimination bear a close relation to those reasons?

These two standards are to be considered in light of "the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.*, at 396.

We have devoted a substantial portion of this brief to demonstrating that there are valid independent reasons for the preference in oil and gas-related employment given to Alaska residents under Local Hire.[25] Stated briefly, they are to reduce the State's traditionally high rate of unemployment and develop its "human

---

[25] As we pointed out *ante* at n. 9, the Alaska Supreme Court did not address the question of whether the State's asserted "independent reasons" were valid since it reached its decision by applying the *McCready* "exception" to Local Hire. Contrary to appellants' reading of the Alaska Court's decision, that Court did not reject any of those asserted "independent reasons". Their validity is a question of law which may properly be determined by this Court.

resources,"[26] to carry out to the fullest its duty to provide for the general welfare of its own people, and to effect its constitutional duty under Article VIII, Section 2 of the Alaska Constitution.

Local Hire is clearly not discrimination for discrimination's sake. Each of the reasons set out above arises out of considerations unrelated to any *animus* toward, or distrust or dislike of, non-residents. As such, they are "independent reasons" for the discrimination as that term is used in *Toomer*. Moreover, they are valid when viewed in light of the fact that the State has a direct ownership interest in the land and resources which generate the employment which is subject to the Act. The State *does* have a duty to use those resources in furtherance of the welfare of its people.

Unlike *Toomer*, where the degree of discrimination involved a license fee one hundred times higher for non-residents than residents, the degree of discrimination is minimal and is rationally related to the State's valid independent reasons. The discrimination involves only a preference in covered employment. It does not prohibit the hiring of non-residents,[27] and it does not bar non-residents from coming to Alaska. Further, it

---

[26]See in this regard the following publications of the Federal Field Committee for Development Planning in Alaska:

a. "Economic Outlook for Alaska" (1971)

b. "Strategies for Economic Development in Alaska" (1971)

c. "A Subregional Economic Analysis of Alaska" (1968)

d. "Alaska Natives and the Land" (1968)

[27]Approximately one quarter of covered employment on the Trans-Alaska Pipeline was filled with non-residents. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 11a.; 565 P.2d at 166.

does not require that unqualified residents be given the preference,[28] and it applies only to employment which is the result of State-granted oil and gas leases, pipeline rights-of-way, etc.[29] – there is a direct contractual nexus between the State and the covered employment. If there is more that the State must show to demonstrate the validity of Local Hire under the privileges and immunities clause, we are unable to perceive, without the benefit of any arguments on the matter from appellants, what it might be.[30]

[28]The State undertook a wide-ranging training program to qualify individuals for jobs on the Trans-Alaska Pipeline. *Op.*, Appendix to Appellants' Jurisdictional Statement, p. 11a; 565 P.2d at 164; Affidavits of Robert D. Booher, Robert M. Davis, and Gerald D. Hiley, R. 84-89 and 92-94.

[29]In June of 1976, the height of pipeline construction activity, Local Hire applied to only six percent of total employment in the state. Op., Appendix to Appellants' Jurisdictional Statement, p. 2a, n. 1; 565 P.2d at 161, n. 1.

[30]Consistent with our analysis, we believe it is clear from a reading of House Report 624 on H.R. 7999, the bill which became the Alaska Statehood Act, *supra*, that Congress fully intended to make Alaska "master in fact of most of the natural resources within its boundaries", 1958 U.S. Code, Cong. & Adm. News, at 2933-2934, so that the new state could tap its economic resources and manage them in the manner it considered most beneficial to the Alaskan people:

> The grant of statehood means the grant to the people of Alaska of the right to manage their own internal affairs and the right to send representatives to the Congress in Washington. It is therefore a measure in support of the principle of local government of local affairs, embodied in American legal philosophy under the concept of States rights. Behind the idea of States rights and local self-government lies the conviction that matters of local concern can best be determined and most efficiently managed by those most directly affected.

Id., at 2941. Local Hire was enacted in pursuance of the Congressional plan for Alaska. It does not violate the privileges and immunities clause.

IV.

LOCAL HIRE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants also assert that Local Hire violates the equal protection clause of the 14th Amendment. They assert, first, that a classification which draws a line based on residence/non-residence is a "suspect classification." Secondly, they claim that Local Hire infringes upon the "fundamental right" of interstate travel, even though the one year durational requirement originally part of the Act was struck by the Alaska Supreme Court.[31] The argument is flawed in both cases.

A. Non-Residency Is Not A Suspect Classification.

Appellants suggested below, and do so again now, that non-residency should be declared a "suspect classification" as that term is used by this Court in determining which degree of judicial scrutiny should be applied to state action challenged under the equal protection clause. See, *e.g.*, *San Antonio Independent School District v. Rodriguez, supra.* By what might be best chatacterized as a bootstrap approach, appellants argue that, since alienage is a suspect classification (*Graham v. Richardson,* 403 U.S. 365 (1971)) and the privileges and immunities clause was adopted to protect citizens from the "disabilities of alienage" (*Lemmon v. People,* 20 N.Y. 607 (1806)), the degree of protection afforded aliens

[31]The Alaska Court did permit the State to impose a 30 day period for processing applications for residency cards and as an indicator of bona fide residence and intent to remain in Alaska. Appellants raise no challenge to this *de minimus* durational aspect, however.

under the 14th Amendment should also be provided to them.[32] This reasoning is circular and erroneous. "Alienage" was designated by this Court as a "suspect classification" in order to guarantee a state's *resident* aliens the equal protection of its laws as they applied to residents who were citizens; it has no reference to aliens who are non-residents.

In making their argument, appellants overlook three crucial and distinguishing factors. First, unlike aliens, the rights of non-residents (citizens of any other state) are already protected by two provisions of the United States Constitution. Those provisions are the privileges and immunities clauses of Article IV, Section 2 and the 14th Amendment.[33] It is true that the privileges and immunities clauses do make a classification based on non-residency (being a citizen of another state) "suspect" for purposes of bringing the judicial scrutiny called for by those clauses into play. However, that is

[32]The Alaska Court rejected this contention by pointing out that:

> Alienage most obviously differs from non-residence in a state because of the difficult and time consuming process required to become a U.S. citizen, as opposed to the ease with which a person can change his residence to a new state. In addition, the plenary power of the political branches of the federal government to exclude and control aliens has no equivalent in the state government, which cannot similarly exclude or control U.S. citizens resident in other states.

Op., Appendix to Appellants' Jurisdictional Statement, p. 14a; 565 P.2d at 167.

[33]One of those protecting clauses has consumed the major position of this brief. Neither of those clauses is available to an alien – a non-citizen.

an entirely different matter from saying that such a classification is "suspect" for purposes of *equal protection* analysis under the 14th Amendment.[34] The first proposition is self-evident; the latter has no basis in legal reasoning.

The second distinguishing factor arises from the setting in which this Court's cases finding alienage to be a "suspect classification" arose. Each of those cases involved discriminations based on alienage and state residency *combined.* The aliens against whom the discriminatory state action operated were not simply traveling through a state on their way to or from their home in another state or country. They were residents of the state which was denying to them certain benefits that it extended to those of its residents who were citizens. The Court held that a discrimination by a state *between classes of its residents* based on alienage could only be permitted upon a clear showing that it was necessary to promote a compelling state interest.[35] But that principle provides no platform for the leap of logic made by appellants. Alienage was designated a "suspect classification" because the states were treating their alien residents differently than their residents who were citizens. Appellants, however, would have the "suspect classification" analysis applied to non-residents *because* it is applied to certain residents. The logic of this approach is baffling. The necessary outcome of

---

[34]This highlights the same analytical difficulty arising out of different useages of the term "fundamental right" discussed *ante* at n. 12 and of the notion of a "right to interstate travel" discussed *post.*

[35]Sugarman v. Dougall, *supra* (civil service); Graham v. Richardson, 403 U.S. 365 (1971) (welfare); Takahashi v. Fish and Game Commission, *supra* (commercial fishing); C.D.R. Enterprises, Ltd. v. Board of Education, *supra,* (public contracts).

appellants' approach is that non-residents should be treated like residents. This simply makes no sense: a resident who is also an alien is still a resident, but a resident who is also a non-resident is a *non-sequitur.*[36]

Third, the central purpose of the 14th Amendment's equal protection clause was the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973). Its scope has been extended by the Court over the years to protect a limited number of other classifications that, "at least in some settings, are also 'suspect' – for example, those based upon national origin, alienage, indigency, or illegitimacy." *San Antonio Independent School District, supra,* Stewart, J., concurring, at 61 (footnote omitted). These classifications have been designated "suspect" because they have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*, at 28. However, in recognizing the validity of numerous state discrimina-

---

[36]This analysis points out the fallacy in appellants' assertion, at p. 43 of their brief, that:

> Indeed, if Alaska Hire is valid, Alaska may discriminate against Washingtonians or Oregonians but not Canadians.

A Canadian who is not a resident of Alaska is not a member of a suspect class for purposes of analyzing the application of Local Hire to him. Under the equal protection clause, he stands on the same footing as the non-residents from Washington and Oregon. On the other hand, if each of them took up residence in Alaska becoming, respectively, an Alaskan from Canada, an Alaskan from Washington, and an Alaskan from Oregon, they would each get the Act's employment preference.

tions based on residence,[37] this Court has never held non-residency to be such a class. As we have already pointed out, the privileges and immunities clauses of our Constitution assure that non-residents (citizens of other states) are not saddled with disabilities. Further, unlike aliens, they have full access to our Nation's political process through the election in their own states of representatives to Congress.[38]

There is no basis for designating non-residency a "suspect classification."

B. Local Hire Does Not Interfere With The Right Of Interstate Travel.

As a final argument, appellants assert that Local Hire should receive this Court's strict scrutiny because it interferes with a non-resident's right to travel interstate. Their argument is based on a line of cases decided by this Court which involved challenges to state-imposed *durational residency* requirements for the receipt of certain state-provided benefits. [39] Unlike the case

[37]See for example, n. 35, and McCarthy v. Philadelphia Civil Service Commission, supra (public employment); Sosna v. Iowa, 419 U.S. 393 (1975) (filing divorce actions in state court); Memorial Hospital v. Maricopa County, supra (free non-emergency medical care); Vlandis v. Kline, 412 U.S. 441 (1973) (preferential university tuition rates); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits).

[38]Presumably Congress could designate discrimination on the basis of residence as an unlawful employment practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. Such a step would effectively pre-empt Local Hire and other state imposed preferences for residents in employment arising out of public construction and procurement contracts. See n. 4, *ante*.

[39]Shapiro v. Thompson, supra (welfare); Graham v. Richardson, supra (welfare); Dunn v. Blumstein, supra, (voting); Memorial Hospital v. Maricopa County, supra, (free non-emergency medical care); Sosna v. Iowa, supra, (filing divorce actions in state court).

now before the Court each of those cases involved state attempts to discriminate between classes of its *residents* – "long-time residents" (those who had been residents for a minimum specified duration – usually one year) and "new residents" (those residents who did not satisfy that durational requirement). In analyzing those distinctions, the Court held that a state could not condition access by its residents to certain "necessities of life," *Shapiro, supra*, on the basis of the length of time they had resided in the state. In the Court's view, such distinctions operated to penalize new residents for exercising their right to interstate migration and could only be justified by a demonstration that the requirement was necessary to promote a "compelling state interest". [40]

[40]We argued to the Alaska Court that Local Hire's employment preference did not involve a basic "necessity of life" and that, therefore, the Act's original one-year durational requirement was not a penalty on the exercise of the right to interstate travel. The Court rejected our position, stating in effect that durational requirements were *per se* penalties on that right and refusing to apply the "basic necessities" inquiry. It then held that Local Hire's one-year durational requirement violated the equal protection clauses of *both* the federal and state constitutions.

The equal protection clause of the Alaska Constitution was interpreted by the State's highest Court as requiring strict scrutiny of all durational requirements without any inquiry as to whether they relate to a basic necessity of life and actually penalize the right to migrate. The effect of that holding was to invalidate the one-year durational requirement, and that holding is not appealable to this Court. However, we believe that the Alaska Court erred by also invalidating the durational requirement under the federal equal protection clause without first making the "basic necessities" inquiry. Had it done so, we believe the Alaska Court would have concluded that the durational requirement was valid under the United States Constitution.

Local Hire does not discriminate between classes of residents.[41] It discriminates between residents and non-residents. This obvious distinction between the cases relied on by the appellants and Local Hire renders those cases inapposite. Appellants have not cited any cases calling for strict scrutiny in analyzing resident/non-resident classifications; there simply are none. Moreover, as we pointed out earlier, this Court has recognized the validity of numerous discriminations based on residence.[42]

Appellants' desire to have the Court apply strict scrutiny to Local Hire's resident/non-resident classification appears to arise from a misunderstanding of the nature of the "right to interstate travel" dealt with by the Court in its durational residency cases. The Constitution recognizes at least two different rights to travel. These are the right to travel casually and the right to migrate. It is clear from reading the durational residency cases that the right to travel addressed by the Court in them was not simply the right to travel casually, *i.e.*, to move about the country on vacation or business, to travel to college in another state, or to visit the seat of government. While this right to move about is surely protected by our Constitution as well, it is not that right of travel which the Court has recognized as "fundamental" for purposes of equal protection analysis.

The right of travel which is "fundamental" under the equal protection clause of the 14th Amendment is the

---

[41]We pointed out earlier, in n. 31, that the Alaska Supreme Court did permit the State to apply a *de minimus* 30 day durational requirement. Appellants have not directed any challenge to that requirement, however.

[42]See n. 37.

right of a person to move his residence (domicile) from one state to another without interference from either state. The Court usually refers to it as "the right to migrate":

> . . . the right of interstate travel must be seen as insuring *new residents* the same right to vital government benefits and privileges in the States to which they *migrate* as are enjoyed by other residents. The State of Arizona's durational residency requirement for free medical care penalizes indigents for exercising their *right to migrate to and settle in* that State. (footnote omitted) (emphasis added)

Memorial Hospital v. Maricopa County, *supra*, at 261-262. Although the Court has used the terms "right to travel," "right to interstate travel" and "right to migrate" interchangeably in its decisions recognizing the right as "fundamental" for purposes of equal protection analysis, it is clear that the right contemplated in those decisions looks only to a person's desire "to migrate, resettle, find a new job, and start a new life." *Shapiro*, *supra*, at 629. The right addressed in those cases does not encompass the more general right of an individual simply to move about the country while maintaining one *locus* as his place of residence or domicile.

Unlike discriminations between classes of residents which burden the right to migrate, the right to move about or to travel casually requires no special guarantees under the equal protection clause. It is already recognized and protected under the privileges and immunities clause of Article IV, Section 2 of the Constitution.[43] Among the rights considered "funda-

---

[43]The right to move about may also be an incident of National citizenship protected under the privileges and immuni-

[footnote continued]

mental" under that clause[44] by Mr. Justice Bushrod Washington in *Corfield v. Coryell, supra*, was "the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.*, 381, 6 F. Cas. 551-552.[45] The right to travel under Article IV, Section 2 has been described by this Court as "the right of free ingress into other states, and egress from them," *Paul v. Virginia, supra*, and "the right of the citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade or business," *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871). Local Hire imposes absolutely no barrier, limit or restriction on any individual's right to travel casually to or through Alaska for any purpose. Nor does it place

---

ties clause of the 14th Amendment. See, generally, the concurring opinion of Mr. Justice Douglas in Edwards v. California, *supra*, at 177-181. However, since that right was clearly protected under Article IV, Section 2 at the time the 14th Amendment was adopted, it seems questionable that the Amendment was intended to encompass it. The better analysis may be to say that the right to move about arises out of Article IV, Section 2 and that the right to migrate arises out of the privileges and immunities clause of the 14th Amendment, since Article IV, Section 2 had no application to a state's newly arrived residents (citizens). But no matter how the privileges and immunities clause of the 14th Amendment relates to the right to move about and the right to migrate, Local Hire imposes no limit, restriction, or barrier on either of them. Appellants have never challenged Local Hire on the basis of that clause.

[44]See our discussion of the different useages of the term "fundamental right", *ante*, n. 12.

[45]Mr. Justice Washington's reference to the "right to reside" obviously refers to an individual taking up residence in the narrow legal sense while maintaining his domicile elsewhere. The Alaska Supreme Court held that the definition of resident for purposes of Local Hire is domicile-based. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 20a-21a; 565 P.2d at 170, 171.

a burden on the right to migrate – if anything it creates an incentive to move to Alaska. As such, there is no basis for submitting Local Hire to the "strict scrutiny" test.[46]

C. Local Hire Clearly Satisfies The Rational Basis Test.

Since strict scrutiny is not the applicable equal protection test for determining the validity of Local Hire, the question becomes whether, affording the statute the presumption of validity to which it is entitled, *McGowan v. Maryland, supra*, the Act is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The Court has expressly stated that this is the test which "has consistently been applied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. 471, 483 (1970).

Appellants make absolutely no assertion that Local Hire does not satisfy this lower level of the Court's

---

[46]Local Hire would withstand strict scrutiny even if subjected to it. As we noted *ante*, n. 9, the Alaska Supreme Court has held that Alaska's interest in "reducing unemployment and 'upgrading Alaska's human resources'" is a compelling governmental interest. Local Hire imposes no erroneous durational requirement, and it is exactly tailored to accomplish the State's purpose – the employment of Alaska residents and a general improvement in the social and economic condition of the Alaska people. Suggestions that Local Hire should be limited to unemployed Alaskans are too restrictive for promoting the State's interests. While Alaska does have a high unemployment rate, many Alaskans are simply underemployed; they work in jobs below their full work potential. Many others are employed in jobs which are only seasonal in nature. Further, the goal of upgrading Alaska's human resources is not limited to just her unemployed human resources.

two-tier equal protection test. They apparently concede that it does, and we think we have already more than adequately demonstrated that it does throughout our preceding analysis. In any event, appellants have the burden of showing that the Act does not meet the test. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911). They have not undertaken any effort to do so.

V.

THE STATE'S POWER TO MAKE CONTRACTS IS AN INDEPENDENT BASIS FOR THE VALIDITY OF LOCAL HIRE.

As an alternative basis for upholding Local Hire, we suggested to the Alaska Supreme Court that the validity of actions taken by the State in the exercise of its contracting power as proprietor of certain resources should be measured by the same standards as those applicable to private persons making the same contracts.[47] The Alaska Court rejected this argument, by way of footnote,[48] as it applied to the one-year durational residency requirement originally contained in the Act. As a matter of sound judicial policy and governmental law, governments probably should not be able to effect discriminations which are wholly invidious in nature through exercise of their contract power. However, saying that much does not resolve the underlying question of whether a state may ever use its

[47] City of Oakland v. Burns, 296 P.2d 333 (Cal., 1956):

> . . . when a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would. (citation omitted), at 337.

[48] *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 9a-10a, n. 10; 565 P.2d at 165, n. 10.

power to make contracts free of traditional constitutional scrutiny.[49]

AS 38.40.030(a) provides, in pertinent part, as follows:

> In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources *shall incorporate* into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party *provisions requiring the lessee* to comply with applicable laws and regulations with regard to hire of Alaska residents. The commissioner *shall include a provision requiring the hiring of qualified Alaska residents*. . . . (emphasis added)

Through this provision the State exercised its authority, pursuant to its contracting power, to establish the conditions under which leases, etc. of certain of the natural resources owned by it would be made. Viewed in this light, it becomes apparent that Local Hire merely serves to instruct the State's executive branch to fix certain terms and conditions under which it may make oil and gas leases and establishes remedies and procedures for enforcement upon a breach of those terms and conditions.

In making gas and oil leases and setting their terms, the State does not exercise its police power "to regulate or license, as lawmaker, an entire trade or profession, or

[49] The cases relied upon by the Alaska Court in rejecting our power of contract argument all involved state supported discriminations along the lines of race. Further, the cases were not really in point because none of them involved a state's making contracts to dispose of its resources.

to control an entire branch of private business, but rather, as proprietor, to manage [its] internal operation(s)," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896, 6 L.Ed. 1230 (1961). While there is no question that the favoring of one class over another by legislation enacted by a state solely on the basis of its general police powers must satisfy scrutiny under applicable provisions of our Constitution, it is not clear that actions by the states in the exercise of their contract powers – more specifically the power to acquire and dispose of property – must also be subjected to that scrutiny. With respect to the powers of the federal government, this Court held, in 1940, that it, "[l]ike private individuals and businesses, . . . enjoys the *unrestricted power* . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (emphasis added). The Court appears to have acknowledged the validity of this proposition as it applies to the states by affirming *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (D.M.D. Fla., 1972), *aff'd mem.*, 409 U.S. 904 (1972).

The employment which is subject to Local Hire is employment which would not exist but for the State's acting to lease certain of the resources and land which it owns. It appears that a meaningful parallel may be drawn between what Alaska has done by way of Local Hire and the state action dealt with in this Court's recent decision in *Hughes v. Alexandria Scrap Corp.*, *supra*. In that case, the State of Maryland, as purchaser, created a new market for automobile hulks and in implementing the program provided certain advantages to resident scrap processors that were not available to non-resident processors. In response to a commerce

clause challenge by a non-resident processor, the Court held that there was nothing in the commerce clause to prohibit a state, "in the absence of Congressional action, from participating in the market and exercising *the right to favor its own citizens* over others." *Id.*, p. 80 (emphasis added, footnote omitted).[50] If a state may, as a purchaser, involve itself in the abandoned hulk market in a manner favoring residents, it seems that it must also have the authority, as a lessor, to involve itself in an employment market which arises as a result of the lease in a manner which favors its residents.

Except, perhaps, for cases involving invidious discriminations, we suggest that the standard for measuring the validity of the State's exercise of its power as proprietor of certain resources is the same as that applicable to private persons making the same contracts. Since Local Hire is not violative of any statutes applicable to private contractors prohibiting discrimination against non-residents, this Court should uphold the Act as being a proper exercise of the State's power to make contracts and fix their terms and conditions.

---

[50]Appellants have never asserted that Local Hire is pre-empted by federal law. It is not. Sec. 401 of the Trans-Alaska Pipeline Authorization Act, P.L. 93-153, 87 Stat. 576, provides in pertinent part as follows:

CIVIL RIGHTS

> Sec. 403. The Secretary of the Interior shall take such affirmative action as he deems necessary to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under Title II.

It makes no mention of discrimination on the basis of residence. See also 42 U.S.C. 2000e-2.

VI.

NEW CLAIMS RAISED BY AMICI ARE NOT PROPERLY BEFORE THE COURT, BUT EVEN IF THEY WERE, THEY LACK BOTH SUBSTANCE AND SUPPORT IN THE RECORD.

As we pointed out in our objections to the briefs of the National Right to Work Legal Defense Foundation and Peabody Testing-Bill Miller X-Ray, Inc., the various challenges to Local Hire raised by them but never presented to the lower Courts may not properly be presented to this Court. *Walters v. St. Louis*, 347 U.S. 231, 233 (1954). But even if these claims could be raised now, they simply lack substance as applied to Local Hire and are without factual support in the record. We have already made reference to the commerce clause claims and, beyond a brief mention of two others, we do not intend to address them further.

A. Local Hire Does Not Constitute Slavery Or Involuntary Servitude.

In an interesting and historically enlightening discourse on the nature and scope of the 13th Amendment to the Constitution, the National Legal Right to Work Defense Foundation urges the conclusion that Local Hire is invalid because it imposes a condition of slavery or involuntary servitude in violation of that amendment.

We do not doubt that it is for this Court to decide the meaning of the words "slavery" and "involuntary servitude," but, in the words of Mr. Justice Field speaking of the scope of the 13th Amendment in the *Slaughterhouse Cases, supra:*

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government – a declaration designed to establish the freedom of four million of slaves – and with a microscopic search endeavored to find in it a reference to servitudes, [which prohibits states from limiting the availability of employment opportunities], requires an effort, to say the least of it.

Id. at 406. We are not cited to any cases defining "slavery" or "involuntary servitude" so broadly as to make them even arguably applicable to state created resident employment preferences such as Local Hire or the similar preferences established by numerous states in employment arising out of various public contracts. See n. 4, *ante*. We find it difficult to believe that the 13th Amendment was intended to prohibit state action of that nature.

B. Local Hire Is Not Pre-Empted By The NLRA.

The brief of Peabody Testing-Bill Miller X-Ray, Inc. suggested a novel pre-emption theory based on an asserted conflict between Local Hire and the National Labor Relations Act (NLRA) 29 U.S.C. 151 et seq. That claim, too, was never advanced at any stage of the proceedings in the lower courts.[51]

Beyond the fact that not all oil and gas-related employment is unionized and is therefore not governed by the NLRA, there simply is no conflict between the NLRA and Local Hire or the way in which it has been enforced, and there is nothing in the factual record to

---

[51] This is simply an inappropriate forum for Peabody-Miller to raise its defenses to the State of Alaska's efforts to enforce Local Hire.

support such a finding.[52] Had such a claim been properly raised at the trial court level, we would have shown that no such conflict exists by establishing at least the following facts: that both unions and management freely agreed to carry out their hiring procedures in accordance with Local Hire; that the Office of the General Counsel to the National Labor Relations Board has issued an opinion stating that unions may, consistent with the NLRA, establish dispatch procedures which are in accord with Local Hire; that union contracts covering work subject to Local Hire did not provide for a lay off procedure which was inconsistent with Local Hire; and that, with respect to Peabody-Miller, the union representing its X-ray technicians *sought* to dispatch Alaska residents to that employer, but Peabody-Miller refused to accept them. Further argument before the Court on this issue is unnecessary and probably inappropriate.

CONCLUSION

Based on the foregoing, we believe it clear that Local Hire is fully consonant with the Constitution and that the decision of the Alaska Supreme Court should be affirmed. As stated by the Alaska Court, the Act "gives the state's benefits to those who bear its burdens, without placing any limitation on who may voluntarily assume those benefits and burdens." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 18a; 565 P.2d

---

[52]If Local Hire conflicts with the NLRA *on its face*, then so do the requirements imposed by various states for preferential employment of residents in work arising out of public construction and/or procurement contracts let by them and their political subdivisions. See n. 4, *ante*.

at 169. If a state may not do this much for its own people, we wonder for what reason our system of federalism exists.

RESPECTFULLY SUBMITTED at Juneau, Alaska this day of February, 1978.

OFFICE OF THE
ATTORNEY GENERAL

By: _____
RONALD W. LORENSEN

Assistant Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600
Counsel for Appellees.

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,
Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

REPLY BRIEF OF APPELLANTS

ROBERT H. WAGSTAFF
WAGSTAFF & MIDDLETON
912 W. Sixth Avenue
Anchorage, Alaska 99501

LEE S. GLASS
JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

Counsel For Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

I. Comment On Factual Statement Of Appellees 1

II. Comment On Argument Of Appellees

A. Privileges and Immunities 4

B. Commerce Clause Cases Are Helpful 7

C. *McCready* v. *Virginia* 10

III. Alaska Hire Violates The Fourteenth Amendment

A. Non-residency Is Comparable to Alienage 13

B. Right to Travel 14

C. Contractual Rights 15

IV. Comment On Brief Of Amicus Curiae State Of Hawaii 15

V. Conclusion 18

TABLE OF CASES AND AUTHORITIES

Cases:

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L.Ed. 1032, 1038 .....2, 18

C.D.R. Limited v. *Board of Education*, 412 F.Supp. 1164 (1976) aff —— U.S. ——, 50 L.Ed.2d 742 (1977) 6

Corfield v. *Coryell*, 6 F.Cas. 546 (C.C.E.D. Pa. 1823) .. 10

Crane v. *New York*, 239 U.S. 195 (1915) 7

Douglas v. *Seacoast Products*, —— U.S. ——, 52 L. Ed.2d 308 (1977) 4, 11

Foster Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 8

Graham v. *Richardson*, 403 U.S. 365 (1971) 7

Heim v. *McCall*, 239 U.S. 175 (1915) 7

Table of Cases and Authorities Continued

	Page
Holmes v. *City of Atlanta*, 350 U.S. 879, 100 L.Ed. 776 (1955)	15
Hughes v. *Alexander Scrap Corporation*, 426 U.S. 794 (1976)	8, 9
McCready v. *Virginia*, 94 U.S. 391 (1877)	11, 13
Mullaney v. *Anderson*, 342 U.S. 415 (1952)	11, 12
Oklahoma v. *Kansas Natural Gas*, 221 U.S. 229 (1911)	7, 8, 10
Paul v. *Virginia*, 8 Wall. 168 (1869)	11
Pennsylvania v. *Board of Directors of City Trusts*, 353 U.S. 230, 1 L.Ed.2d 792 (1957)	15
Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923)	7, 10
State v. *Wylie*, 516 P.2d 142 (1973)	3, 15
Sugarman v. *Dougall*, 413 U.S. 634 (1973)	7
Truax v. *Raich*, 239 U.S. 33 (1915)	9
Toomer v. *Witsell*, 334 U.S. 385 (1948)	2, 3, 11, 12, 13
Turner v. *City of Memphis*, 369 U.S. 350, 7 L.Ed.2d 762 (1965)	15
Ward v. *Maryland*, 12 Wall. 418 (1871)	11

ALASKA STATUTORY PROVISIONS

Alaska Statutes 38.40.010, 020	1
Alaska Statutes 38.40.050	5
Alaska Statutes 38.40.090	14
8 AAC 35.011	6
8 AAC 35.080	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants*,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees*.

On Appeal from the Supreme Court of the State of Alaska

REPLY BRIEF OF APPELLANTS

I

COMMENT ON FACTUAL STATEMENTS OF APPELLEES

Appellees maintain that the findings of the Alaska legislature concerning the purported purpose of Alaska Hire are both plausible and relevant.[1] They are wrong on both counts. Much of their argument turns upon this contention.

---

[1] *See* AS 38.40.010, 020. App. p. 6.

Their position is contrary to the specific findings of the Supreme Court of the State of Alaska. That court recognized that Alaska Hire is simply an economic preference given to all Alaskans.

> We rely on the *McCready* 'natural resources exception' to the privileges and immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the 'independent reasons' exceptions to the privileges and immunities clause articulated in the quotation from *Toomer, supra.* The trial judge referred to Alaska Hire as an attempt to solve 'problems that may be typified as social, racial, educational and economic.' We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523, 79 L. Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns. Juris. App. I, p. 19a.

The court also noted:

> The extent to which the Alaska Hire law in fact benefits unemployed Alaskans and those in job training is questionable. Alaska Hire does not distinguish among those who have been one-year residents; it gives all of them an absolute preference over those who are not one-year residents. A lifelong Alaskan employed in a private business or the public sector would be entitled to preference under Alaska Hire if he sought a new job. An unemployed person, or one who had just completed a private or public training course qualifying him for pipeline or petroleum employment, but who had taken an extended trip outside the state eleven months earlier, would be unable to obtain preference.
>
> * * * *
>
> The challengers point out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees. Juris. App. I, pp. 9a-10a.

Appellants submit that the legislative findings here are transparently disingenuous. Alaska Hire is simply an across the boards preference given to all defined Alaska residents.

Appellees assert that the Alaska Supreme Court has said that "reducing unemployment and upgrading Alaska's human resources" is a compelling governmental interest that would pass strict scrutiny. But this language is from *State* v. *Wylie,* 516 P.2d 142 (1973), a government employment case that the majority of the Alaska Supreme Court below distinguished from this case.

> To state the differences between the facts of this case and *Wylie* is not to decide the issues. Juris. App. I, pp. 7a-9a.

II

COMMENT ON ARGUMENT OF APPELLEES

A. Privileges and Immunities.

Appellees noticeably fail to address what this Court has recognized in *Toomer* v. *Witsell,* 334 U.S. 385

(1948), and *Douglas* v. *Seacoast Products,* —— U.S. ——, 52 L.Ed.2d 308 (1977), as being the proper privileges and immunities test. "Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Douglas* v. *Seacoast Products, Ibid,* pp. 319-320. Instead, appellees maintain that there are valid "independent reasons" justifying discrimination against nonresidents. The asserted reasons are those which the court below rejected.

Appellees attempt to play down the scope of Alaska Hire, stating that "It applies *only* to that oil and gas related employment which arises from 'oil and gas leases, easements, or right-of-way permits for oil or gas pipeline purposes, unitization agreements or renegotiation of any of the preceding.' " Appellees' Brief, pp. 6-7 (emphasis in original). Even the court below conceded the breadth of the statute's coverage.

> Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. Juris. App. I, pp. 1a-2a.

The two dissenting justices pointed to the practical affect of Alaska Hire ("Only if qualified Alaska residents are unavailable, may others be employed.") and then noted the consequences of the "arises from" qualifier of appellees' definition.

> The provisions of this act apply also to all employment which is the *result* of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems

> utilizing oil and gas obtained under Alaska leases. Juris. App. I, p. 23a (emphasis supplied).

The Act and regulations do not require that the State be an actual party as inferred by appellees. Alaska Hire by regulation is equally applicable to subcontractors and suppliers. The Act as codified states in part:

> Sec. 38.40.050. *Applicability of chapter.* (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. App., p. 8.

The regulations state:

> Suppliers. (a) *Suppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor.*
>
> (b) A supplier who provides delivery, installation or pre-operational testing of goods shall not be considered a contractor or subcontractor of the lessee or other person subject to AS 38.40. However, *a supplier who provides services for any person or business subject to AS 38.40 shall be considered a contractor or subcontractor and shall be subject to all requirements of AS 38.40 pertain-*

ing to contractors and subcontractors. 8 AAC 35.080. Juris. App. III, p. 53a (emphasis supplied).

Appellees conclude:

> Finally, Local Hire does not even bar non-residents from that employment which is subject to the Act. The Act only requires that Alaskan residents who are available and qualified to do the work be hired before non-residents.[5] Appellees' Brief, pp. 7-8.

Yet the majority of the court below found:

> The state also suggests that our scrutiny should be less strict because Alaska Hire does not bar non-residents from employment, but merely gives a preference to residents. But as long as there are available Alaska residents, it *is* a bar to those who cannot meet the residency standards. Be it bar or preference, the appellants have sought jobs on the pipeline, but have been unsuccessful because of the Alaska Hire law. A state labor official testified that about 74 percent of the pipeline workforce meet the Alaska Hire residency requirements. Juris. App. II, p. 11a (emphasis in original).

Appellees argue that if Alaska Hire will cause a Balkanization of the United States the residency preference created by some States for employment on public construction projects must have already lead to such a condition. Appellees' Brief, footnote 4. To the extent suggested this is true.[6] But the swath of Alaska Hire

---

[5] 8 AAC 35.011, Juris. App. III, p. 39a, requires additionally that non-residents be first hired.

[6] There is a serious question about the validity of laws which require a residency preference in public construction projects. In *C.D.R. Limited* v. *Board of Education*, 412 F. Supp. 1164 (1976), aff. —— U.S. ——, 50 L.Ed.2d 742 (1977), a three judge

is much greater than that of public construction projects. It is applied to strictly private activities in which the State's interest is at best tangential.

Appellants do not quarrel with the proposition that State governments have the power to legislate concerning matters within their general police power. Nor do appellants deny the existence of the 10th Amendment. What appellants believe is that whatever action a State takes must be in conformity with the Constitution of the United States.

B. Commerce Clause Cases Are Helpful.

Appellees attempt to distinguish the analogous applicability of the commerce clause cases of *Oklahoma* v. *Kansas Natural Gas*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), on the basis that the natural gas there was privately owned. Appellees' Brief, p. 14. This fact is not relevant to the applicability of holdings that concern the regulation of natural resources within a State. In Alaska there is little private property and the State is the virtually exclusive owner of the resources. Instead of attempting to control the marketing of gas, Alaska restricts

---

panel held that a New York statute granting a preference in employment in public construction projects to citizens over aliens who were lawfully admitted residents violated the equal protection clause of the 14th Amendment. Appellees have misunderstood the holding in *C.D.R.* as expressed in note 6 of their brief. The court did not uphold the validity of such residency preferences. The court recognized that the cases of *Heim* v. *McCall*, 239 U.S. 175 (1915) and *Crane* v. *New York*, 239 U.S. 195 (1915) were effectively overruled by *Graham* v. *Richardson*, 403 U.S. 365 (1971), and *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). "*Crane* and *Heim* are not simply moribund; we believe they are dead. Otherwise the results in *Graham* and *Dougall* could not have been reached." 412 F.Supp. 1170.

employment with respect to the resources that it purports to own.

> "If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? . . . If one state has it, all states have it; embargo may be retaliated by embargo and commerce will be held at its state lines."

Oklahoma v. *Kansas Natural Gas, supra,* p. 255. A similar phenomenon will be present if a State may restrict access to employment in such designated industries. "But rather let us say it is constituted of the welfare of all of the states, and that of each state is made greater by a division of its resources, *natural* and *created,* with every other state, and those of every other state with it." *Ibid* (emphasis supplied).

Appellees' similar criticisms of the commerce clause case of *Foster Fountain Packing Company* v. *Haydel,* 278 U.S. 1 (1928), is not well taken. Because of the common roots and purposes of the commerce clause and the privileges and immunities clause, there is found a natural and complimentary relationship of one with the other. Appellees fail to state why the language of these cases is not directly applicable by analogy to the privileges and immunities problem presented by Alaska Hire.

In note 23 appellees themselves cite the commerce clause case *Hughes* v. *Alexander Scrap Corporation,* 426 U.S. 794 (1976), for the proposition that as a State may participate in the market and exercise its right to favor its citizens over others, so the privileges and immunities clause was not intended to forbid a State

from requiring a preference for residents in employment in a job market which it has created. *Hughes* was a case in which a Virginia corporate scrap processor sued Maryland officials challenging the constitutionality of the Maryland junk automobile statute under which Maryland paid a bounty to scrap processors for the destruction of any vehicles formerly titled in Maryland. The law permitted Maryland processors to prove ownership of a hulk by a simple indemnity agreement while requiring non-Maryland processors to prove ownership by a certificate of title, police auction, or a licensed record certificate. Maryland contended, and this Court agreed, that there was a justification for the discrimination against non-residents because such discrimination, which made it easier for an in-State processor to prove title, tended to insure that the State's limited resources were protected and that the hulks abandoned did come from inside Maryland as opposed to from some contiguous State. The Court found that these assumptions were not irrational, under the lesser standard of the two-tiered equal protection test. Here any equal protection analysis concerning discrimination in employment because of residency is properly subjected to strict scrutiny, as appellants are members of a suspect class. *See* Argument II, Appellants Brief, p. 34.

Appellees contend that *Truax* v. *Raich,* 239 U.S. 33 (1915), "clearly acknowledges" that a State may regulate the use of its resources to preserve them for its own people. But Alaska Hire does not limit use of State owned resources; rather it requires discrimination against non-residents in private employment related to a resource industry. Appellees assert that this employment "owes its very existence to the State" and

suggests that this status places the jobs on exactly the same plane as residency requirements in public employment and public construction contracts. Regardless of the continuing validity of public employment and public construction contract preferences (*see* footnote 3, *supra*) Alaska Hire relates to employment in private industry. The premise that is advanced throughout appellees' brief is that but for the largesse of the State of Alaska, oil and gas jobs would not exist. Appellees are suggesting that the State has the authority to keep such resources locked up. The Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719, recognizes the strong national interest in Alaska gas. Alaska does not have the authority to stop resource extraction. *See Pennsylvania* v. *West Virginia, supra,* and *Oklahoma* v. *Kansas Natural Gas, supra.*

C. McCready v. Virginia.

Appellees maintain in Section III of their brief that *McCready* remains viable. They also assert, first, that employment is not a fundamental privilege and immunity and, second, that it has not been shown that the discrimination does not bear a close relationship to the purported reasons for it. With respect to these assertions, appellees are in fundamental error.

Appellees admit that the fundamental right analysis under the privileges and immunities clause encompasses a far broader range of rights than those that are termed fundamental for purposes of the 14th Amendment. In speaking of the fundamental privileges and immunities of State citizenship in *Corfield* v. *Coryell,* 6 F.Cas. 546 (C.C.E.D. Pa. 1823) Justice Washington recognized "The right of a citizen of one state to pass through, or to reside in the other state, for purposes of

trade, professional pursuits, or otherwise . . . ." *Ibid,* p. 552. Additionally, in *Ward* v. *Maryland,* 12 Wall. 418 (1871), this Court stated, "the clause plainly and unmistakeably secures and protects the right of the Citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation. . . ." *Ibid,* pp. 452, 453. And in *Paul* v. *Virginia,* 8 Wall. 168 (1869), the Court said that "it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and pursuit of happiness. . . ." *Ibid,* p. 180. The constitutional right of a citizen of one State to go to another State and work cannot be denied at this late date, and indeed must be deemed a fundamental right comprehended in the privileges and immunities clause. As suggested by appellees, the use of the word "fundamental" should perhaps be avoided, as Justice Washington's initial use of the word predated the Fourteenth Amendment. Stated differently, employment is within the scope of the privileges and immunities clause.

Appellants have argued, indeed the Supreme Court of the State of Alaska has found, that the means utilized in Alaska Hire does not bear any close relationship to purported ends of reducing unemployment. There can be no justification for a blanket employment preference to all residents in a purported attempt to address the problems of unemployed residents.

Appellees further assert that *McCready* has not in fact been effectively overruled by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Mullaney* v. *Anderson,* 342 U.S. 415 (1952), and *Douglas* v. *Seacoast Products,* —— U.S. ——, 52 L.Ed.2d 304 (1977). Appellants disagree

for the reasons stated in their brief. Notwithstanding, *McCready* is inapplicable to Alaska Hire as it narrowly concerned access to oyster beds, not employment in the oyster industry. In note 15 appellees assert that this Courts' action in *Mullaney* v. *Anderson,* 342 U.S. 415 (1952) was because of "the Territory of Alaska's failure to provide any evidence justifying it (a license differential) and not because the difference was excessive as in *Toomer.*" This stems from the assertion that no mention of *McCready* is made in *Mullaney,* and thus that the Court simply followed *Toomer* unaware of *McCready.* Appellees ignore that the *Toomer* Court fully discussed and effectively overruled *McCready.*

Appellees' citation of the concurring opinion of Mr. Justice Frankfurter in *Toomer* in support of their position that the State may utilize its resources on behalf of its own citizens is inappropriate. Appellees maintain that "Alaska's claim is as solid and real as the land on which the Transalaska Pipeline is built," and then, in Footnote 19, assert:

> It appears that this case is the first privileges and immunities case involving a state's regulating the distribution or use of *land* which it owns in favor of its residents to be decided by this Court since *McCready* in 1877.

This case does not concern State regulation of the distribution or use of land that it owns in favor of its residents. This case concerns discrimination against the residents of other States in private employment in the oil and gas industry. Appellants believe that Alaska Hire is the specific type of discrimination that the privileges and immunities clause was designed to prohibit.

Appellees assert that *even* if Alaska Hire does violate the privileges and immunities clause, the law is still

sound because the privileges and immunities clause is not absolute, citing *Toomer* v. *Witsell, supra,* p. 396. They assert that *Toomer* permits discrimination against non-residents in violation of the privileges and immunities clause when there are independent reasons for the disparity of treatment and when the degree of discrimination bears a close relation to these reasons. Appellees' Brief, p. 33. Appellants believe that this is a misreading of *Toomer.* The privileges and immunities clause does constitute an absolute bar against certain *categories and types* of discrimination of which it is asserted Alaska Hire represents one. The proper contemporary test is simply if Alaska has exercised its purported police power in conformity with the Constitution.

Alaska Hire as this Court should view it does not even meet the test suggested. Appellees' argument is based upon a misunderstanding of what the Alaska Supreme Court has held. The Alaska Supreme Court found that Alaska Hire is simply an across the board economic preference for all Alaskans, *not* just those unemployed. It is that court's interpretation of State law, and not the asserted "independent reasons" of reduction of the State's traditionally high rate of unemployment and development of human resources, upon which this Court should focus.

III

ALASKA HIRE VIOLATES THE FOURTEENTH AMENDMENT

A. Non-residency Is Comparable To Alienage.

Appellees argue that the alien cases cited involved residents of the States and that the cases therefore turned on discrimination by a State between classes of its residents. The use of the word "resident" should be

clarified in this analysis. A resident for purposes of Alaska Hire means a domicilary citizen of the State of Alaska.[4] A resident in the alienage case means a foreign national who is lawfully present in the State. An alien by definition cannot be a domicilary. Citizens of other States traveling to Alaska to find employment may be considered residents under the alienage definition of residency but not under Alaska Hire's. Therefore a citizen of Canada residing in Alaska can not be discriminated against in oil and gas employment but a citizen of another State residing in the same manner in Alaska may be discriminated against according to Alaska Hire.

B. Right To Travel.

Appellees also assert that the right to travel cases involve discrimination between classes of residents, and are therefore inapposite. As appellants have stated in their brief, Alaska Hire may indeed no longer burden those who in fact have recently migrated to Alaska to become permanent residents and have lived there for thirty days. However, Alaska Hire does inhibit travel to Alaska by citizens of other States who do not wish to become permanent residents of Alaska or who are undecided. *See* Appellants' Brief, p. 44. Any attempt to find oil or gas related employment is effectively foreclosed unless there is an affirmative commitment to permanent residency. The right to migrate, resettle, find a job and start a new life is discouraged, not casual travel. There is no proper justification for requiring migration with domicilary intent as a prerequisite to obtaining a new job.

---

[4] *See* A.S. 38.40.090, App. p. 12.

C. Contractual Rights.

Appellees' arguments concerning the State's contract power as an independent basis for the validity of Alaska Hire is specious. This argument was specifically rejected by the Supreme Court of Alaska:

> The state offers as an alternative justification for Alaska Hire, in addition to its police power, the state's own proprietary power over the resources it owns. The state asserts it is not subject to the equal protection clause in the management of its property. This is not the law. State v. Wylie, 516 P.2d 142, 146 (Alaska 1973), made it clear that the state in its capacity as *employer* must obey the Fourteenth Amendment. The state as a trustee of property must obey the Fourteenth Amendment. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 1 L.Ed.2d 792 (1957). The Fourteenth Amendment applies equally to a state or city using the police power to regulate private business (Turner v. City of Memphis, 369 U.S. 350, 7 L.Ed.2d 762 (1962) (racial segregation in restaurants)) and using its proprietary powers to manage its own property (Holmes v. City of Atlanta, 350 U.S. 879, 100 L.Ed. 776 (1955), *vacating* 223 F.2d 93 (5th Cir.) (racial segregation of municipal golf courses)). Juris. App. I, pp. 9a-10a.

IV

COMMENT ON BRIEF OF AMICUS CURIAE STATE OF HAWAII

The brief submitted by the State of Hawaii provides a helping showing of the dangers of Alaska Hire and how other States predictably will act if it is allowed to stand.

In its brief Hawaii asserts that it has unique problems and concerns because of its "significant cultural

and ethnic composition and a very high rate of unemployment." Hawaii Brief, p. 2. Hawaii asserts that it has the right as a State to limit what it terms as "in-migration":

> With increased in-migration higher unemployment results. More people must be supported at public expense.

Speaking directly of Alaska Hire, the Hawaii Brief states:

> If the Alaska Hire law is struck down, not only will chronic unemployment rise, but a state, having lost control over its ability to maintain the welfare of its people, would be powerless to avoid the onset of an economic recession, aggravated by migrating job seekers. Hawaii Brief, p. 3.

Hawaii believes that because of uniqueness it is entitled to set itself apart from the rest of the States and actively discourage immigration. Predictably, it would be difficult to find a State that did not believe it was unique, with its own unique problems which are entitled to exclusive solution in accordance with its history and life. If Hawaii can limit in-migration to preserve its uniqueness any State can and will. Alaska Hire is a functional if not actual attempt to accomplish a similar end.

It appears that Hawaii may not necessarily be concerned with constitutional law. On December 16, 1977, United States District Judge Samuel T. King issued a preliminary injunction enjoining the enforcement of the durational residency aspect of Act 211 which appears in Appendix 1 of the State of Hawaii's Brief. On page two of his twenty-four page opinion, Judge King noted:

> In January of 1977, defendant Ariyoshi, the Governor of Hawaii, expressed his willingness to 'put the state in direct confrontation with the present laws of this land and possibly even the Constitution of the United States'. He called for 'bold . . . ideas and actions' to combat the problem of potential overpopulation in Hawaii. In response the legislature enacted a new, one-year durational residency requirement for public employment. Although no survey was ever made to ascertain the number of public employees who were residents of the state for less than a year, the Governor signed a law that became effective on June 21, 1977.

The corresponding reasoning of the Hawaii Brief maintains:

> Hawaii, like Alaska, is faced with the real prospect of irretrievably losing many of its natural assets vital to its welfare unless immediate action is taken.
>
> The Alaska Hire Law has a clear rational basis in giving a state the means to avoid becoming a depressed area, with a population far out of proportion to its resources. The State of Hawaii submits that the statute meets valid, legitimate state interests. These interests must be addressed by the states while the Congress of the United States for the first time in our nation's history must attempt to address the problems created by a continually increasing population and rapidly diminishing natural resources.
>
> These twin problems of finite resources and of population growth and redistribution must ultimately be addressed. If these concerns are submerged, if states like Alaska and Hawaii are unable to respond to these problems merely because a few appellants talk in overly strident tones of

> "Balkanization" or "parochialism," then the states could very well forget about the Federal system that was created to meet their often very individual needs, while they await further Congressional action. Hawaii Brief, pp. 8-9.

This insular approach to perceived State problems can not be in accordance with the Framers' intentions. Mr. Justice Brandeis's observations in *Baldwin* v. *Seelig,* 294 U.S. 511, 523 (1935) seems a more appropriate response: "The constitution was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

V

CONCLUSION

For the reasons stated this Court should find Alaska Hire to be repugnant to the spirit of Federalism and the Constitution of the United States.

SUBMITTED this 17th day of March, 1978.

ROBERT H. WAGSTAFF
WAGSTAFF & MIDDLETON
912 W. Sixth Avenue
Anchorage, Alaska 99501

LEE S. GLASS
JOHNSON, CHRISTENSON & GLASS
1200 Airport Heights Road
Anchorage, Alaska 99504

Counsel For Appellants

Supreme Court, U. S.
FILED
JAN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, AND JOSEPH G. O'BRIEN,

Appellants,

vs.

EDMUND ORBECK, COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ALASKA and GUY RICHARD MARTIN, COMMISSIONER OF THE DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA.

BRIEF OF PEABODY TESTING—BILL MILLER X-RAY, INC., AMICUS CURIAE (FOR APPELLANTS)

RICHARD L. MARCUS,
IRVING M. GESLEWITZ,
ADAMS, FOX, MARCUS,
ADELSTEIN & GERDING,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for Peabody Testing—Bill Miller X-Ray, Inc.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

SUBJECT INDEX.

PAGE

Question Presented 1

Statute Involved 2

Interest of Amicus Curiae 3

Argument 4

I.

The Alaska Hire Law Violates the Privileges and Immunities Clause of the United States Constitution, Article IV, § 2 4

II.

The Alaska Hire Law Constitutes an Invasion by State Law Into an Area Reserved to Federal Substantive Law and Policy Under the National Labor Relations Act and Therefore Violates the Supremacy Clause of the United States Constitution, Article VI 7

III.

The Alaska Hire Law Violates the Commerce Clause of the United States Constitution, Article I, § 8 by Preventing Qualified Non-Resident Pipeline Workers from Moving Into the State for the Purpose of Constructing a Resource Distribution System Serving a National Interest 10

IV.

The Alaska Hire Law Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by Subjecting Peabody-Miller to Arbitrary and Discriminatory Regulation Which Interferes with Its Ordinary and Lawful Business Operations 13

Conclusion 15

Table of Authorities Cited.

Cases.

Alaska v. International Union Local 302, 393 U. S. 405, 89 S. Ct. 684 (1969), rehearing denied, 393 U. S. 1112, 89 S. Ct. 858 (1969) 9-10

Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497 (1934) 12

Brown v. Anderson, 202 F. Supp. 96 (D. Alaska, 1962) 5, 12, 14

C. D. R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E. D. N. Y. 1976) 5-6

Crane v. New York, 239 U. S. 195, 36 S. Ct. 85 (1915) .. 5-6

Douglas v. Seacoast Products, Inc., ... U. S. ....., 97 S. Ct. 1740 (1977) 5, 11

Edwards v. California, 314 U. S. 160, 62 S. Ct. 164 (1941) 11, 12

Edwards v. Leaver, 102 F. Supp. 698 (D. R. I. 1952) ... 14

Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1 (1928) 12

Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848 (1971) 5, 14

Grossjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936) 4, 13

H. P. Hood & Sons, Inc. v. DuMond, 336 U. S. 525, 69 S. Ct. 657 (1949) 11

Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954 (1939) .. 4

Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78 (1915) 5-6

Hicklin v. Orbeck, 565 P. 2d 159 (Alaska, 1977) 4

Lefkowitz v. C. D. R. Enterprises, Ltd., ... U. S. ....., 97 S. Ct. 721 (1977) 5-6, 14

Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U. S. 132, 96 S. Ct. 2548 (1976) 9

Lynden Transport, Inc. v. Alaska, 532 P. 2d 700 (Alaska, 1975) 6, 14

McCready v. Virginia, 94 U. S. 391 (1877) 4, 5, 6, 7

Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382 (1920) . 5

Mullaney v. Anderson, 342 U. S. 415, 72 S. Ct. 428 (1952) 5

Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658 (1923) 11

Pike v. Bruce Church, Inc., 397 U. S. 137, 90 S. Ct. 844 (1970) 12

Polar Ice Cream and Creamery Co. v. Andrews, 375 U. S. 361, 84 S. Ct. 387 (1963) 12

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773 (1959) 8

Sugarman v. Dougall, 413 U. S. 634, 93 S. Ct. 2842 (1973) 5, 14

Takahashi v. Fish and Game Commission, 334 U. S. 410, 68 S. Ct. 1138 (1948) 5

Teamsters Local 174 v. Lucas Flour Co., 369 U. S. 95, 82 S. Ct. 571 (1962) 9

Teamster Local 24 v. Oliver, 358 U. S. 283, 79 S. Ct. 297 (1959) 9

Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 77 S. Ct. 912 (1957) 8

Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156 (1948) 5, 6, 11-12
Tyree v. Edwards, 287 F. Supp. 589 (D. Alaska, 1968) .. 9-10
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574, 80 S. Ct. 1347 (1960) 9
West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564 (1911) 11

Constitution.

United States Constitution:
Article I, § 8 10-13
Article IV, § 2 4-7
Article VI 7-10
Fourteenth Amendment, § 1 13-14

Statutes.

National Labor Relations Act, 29 U. S. C. § 151 *et seq.*... 7-10
The Trans-Alaska Pipeline Authorization Act, 43 U. S. C. § 1651 *et seq.* 7
Local Hire Under State Leases Act, Alaska Statute 38.40:
§.020 11
§.030 2
§.070(a) 3

Regulations.

Alaska Administrative Code, 8 AAC 35:
§.011 2
§.025 8
§.042 ..... 2-3, 8
§.044(k) 8

Texts.

Alleyne, "Constitutional Restraints on the Preferential Hiring of Alaska Residents for Oil Pipeline Construction", 2 U. C. L. A.—Alaska L. Rev., 1 (1972) 7

Miscellaneous.

Alaska Senate Bill 294 (1972) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-324.

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, AND JOSEPH G. O'BRIEN,

Appellants,

vs.

EDMUND ORBECK, COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ALASKA and GUY RICHARD MARTIN, COMMISSIONER OF THE DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA.

BRIEF OF PEABODY TESTING—BILL MILLER X-RAY, INC., AMICUS CURIAE (FOR APPELLANTS)

QUESTION PRESENTED.

May Alaska require private employers involved in any oil and gas activities resulting from leases with the state to first hire and last fire Alaska residents in preference to residents of other states?

STATUTE INVOLVED.

The "Local Hire Under State Leases Act" ("Alaska Hire"), AS 38.40, provides, in relevant part, as follows:

> "Sec. 38.40.030. *Resident hire.* (a) In order to create, protect and preserve the right of Alaska residents to employment, the Commissioner of Natural Resources shall incorporate into all oil or gas leases, easements or right-of-way permits for oil or gas line purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and when in the determination of the Commissioner of Natural Resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

The regulations promulgated pursuant to the Alaska Hire law 8 AAC 35, provide, in relevant part, as follows:

> "8 AAC 35.011. REDUCTION OF WORK FORCE. (a) When either a resident employee or a non-resident employee, working in the same trade or craft, is to be laid off, the non-resident may be retained only if no resident employee is qualified to fill the position."
>
> * * * * *
>
> "8 AAC 35.042. DISCRIMINATION AGAINST ALASKA RESIDENTS. The following discriminatory practices by an employer subject to the act against Alaska residents who are employed or seeking employment on a project are prohibited:
>
> (1) hiring non-residents when residents are known to be available, willing and qualified for employment;
>
> (2) rejection of a resident referred to an employer by a collective bargaining agent in favor of a non-resident of similar qualifications in employment covered by a collective bargaining agreement;

> (3) rejection of a resident in favor of a non-resident of similar qualifications in employment not covered by a collective bargaining agreement;
>
> (4) termination of a resident in favor of a non-resident of similar qualifications;
>
> . . . ."

INTEREST OF AMICUS CURIAE.

Peabody Testing—Bill Miller X-Ray, Inc. ("Peabody-Miller") is a joint venture comprised of Bill Miller X-Ray, Inc., an Oklahoma corporation, and X-Ray Engineering Company, a California corporation. Under contract with Alyeska Pipeline Service Company ("Alyeska"), a right-of-way lessee of the State of Alaska, Peabody-Miller performed non-destructive inspection work on the Trans-Alaska Pipeline and related facilities.

Peabody-Miller's special interest in the issue presented in this case arises from the fact that it is presently being prosecuted by the State of Alaska for alleged violation of the Alaska Hire law and the regulations promulgated thereunder. The State's action arises out of 18 separate complaints filed by persons claiming to be Alaska residents who allege that they were denied employment with Peabody-Miller at a time when Peabody-Miller employed non-residents. These complaints became the subject of hearings before the Department of Labor of the State of Alaska which, though adjourned, have not been closed. Since adjournment, the State has moved for the production of considerable additional evidence. Peabody-Miller has incurred and will likely incur substantial litigation expenses as a result of these proceedings. Moreover, the State has indicated it is seeking damages for each complainant equal to three times the wages he or she would have earned working for Peabody-Miller plus any additional damages or expenses incurred as a result of the failure to hire. AS 38.40.070(a).

All parties have consented to the filing of a brief *amicus curiae* by Peabody-Miller.

ARGUMENT.

I.

THE ALASKA HIRE LAW VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE IV, § 2.

By compelling private employers to discriminate in employment against non-Alaska residents of United States citizenry, the Alaska Hire law violates the constitutional mandate set forth in Article IV, § 2 that "[t]he citizens of each State shall be entitled to all privileges of immunities of citizens in the several States."[1]

In rejecting this contention, the majority of the court below erroneously relied on the "natural resources exception" or "ownership" rationale of *McCready* v. *Virginia*, 94 U. S. 391 (1877), to the effect that a state's proprietary, or "ownership" interest in tangible natural resources within its territories allows it to limit the right to deplete them to its own residents.[2] Though the statute in issue here does not regulate the extraction of a State owned resource but rather employment related to the construction of a resource distribution system, the court below concluded that the *McCready* principle still applied since the State had a "contractual nexus" to the construction of the pipeline.[3]

1. Concededly, unlike Appellants, Peabody-Miller lacks the protection afforded by the privileges and immunities clause since it is a corporate entity and not a "citizen". *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954 (1939); *Grossjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936).

2. *Hicklin* v. *Orbeck*, 565 P. 2d 159 (Alaska, 1977).

3. There is some question whether the "contractual nexus" ever really materialized. See footnote 6, *infra*.

While relying on *McCready*, the Alaska Supreme Court was compelled to acknowledge that its rationale had been weakened and distinguished over the years, most significantly by *Toomer* v. *Witsell*, 334 U. S. 385, 402, 68 S. Ct. 1156 (1948). Whatever limited life *McCready* had[4] was finally obliterated by *Douglas* v. *Seacoast Products, Inc.*, ... U. S. ....., 97 S. Ct. 1740 (May 23, 1977) where, primarily on the basis of federal preemption, this Court struck down a Virginia law prohibiting non-resident fishing in Chesapeake Bay. In rejecting the "ownership" argument advanced by the state, this Court stated:

> ". . . . The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' [Citing, *inter alia, Toomer*] Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. . . ."[5]

4. The dissenting opinion below cogently argued that *Toomer* in effect "cast . . . serious doubt on the continued authority of *McCready*". *See also Mullaney* v. *Anderson*, 342 U. S. 415, 72 S. Ct. 428 (1952) (striking down on the basis of *Toomer* a law of the Territory of Alaska); *Missouri* v. *Holland*, 252 U. S. 416, 434, 40 S. Ct. 382 (1920); and *Brown* v. *Anderson*, 202 F. Supp. 96, 102 (D. Alaska, 1962), where a three-judge panel pronounced ". . . Defendants say McCready is good law. The ownership theory was put at rest, however, in Toomer v. Witsell. . . ."

5. In *Heim* v. *McCall*, 239 U. S. 175, 36 S. Ct. 78 (1915) and *Crane* v. *New York*, 239 U. S. 195, 36 S. Ct. 85 (1915), a *McCready*-type concept served to uphold the constitutionality of a New York statute requiring that citizens of the State be given employment preference on state public works projects.

Like *McCready*, the "*Heim-Crane*" doctrine has been eroded over the years. *See Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 68 S. Ct. 1138 (1948); *Graham* v. *Richardson*, 403 U. S. 365, 91 S. Ct. 1848 (1971); *Sugarman* v. *Dougall*, 413 U. S. 634, 93 S. Ct. 2842 (1973). Finally, in *Lefkowitz* v. *C. D. R. Enterprises, Ltd.* ..... U. S. ....., 97 S. Ct. 721 (1977), this Court affirmed a federal district court decision striking down a New York

(Footnote continued on next page.)

Significantly, the court below appeared to acknowledge that, absent the *McCready* "ownership" exception, the Alaska Hire act cannot pass constitutional muster. Thus, the court took pains to reject the trial judge's attempts to find other independent state justifications for the legislation such as would meet the tests enunciated in *Toomer*. Indeed, the court characterized Alaska Hire as "economic protectionism for its own sake". In a previous case, the same court had expressly rejected this as a legitimate basis for discrimination:

> "Benefiting economic interests of residents over nonresidents is not a purpose which may constitutionally vindicate discriminatory legislation." *Lynden Transport, Inc.* v. *Alaska,* 532 P. 2d 700, 711 (Alaska, 1975).

Moreover, in the decision below the court practically conceded that, absent ownership, economic protectionism or, more euphemistically, "an attempt to strengthen the Alaskan economy" is not a sufficient basis for discrimination:

> "The natural resources of Alaska 'belong' to Alaska and Alaskans in a way that, in our federal system, Alaska's society and economy in general do not."

Given the now complete discrediting of the *McCready* natural resource exception, the lower court's distinction and rationale are simply not viable.

Resurrection of the *McCready* "ownership" theory would be particularly anachronistic in the context of this case. The vast majority of land over which the pipeline extends is federally owned; it traverses state land only at certain points along its

(Footnote continued from preceding page.)
statute virtually indistinguishable from that involved in *Heim* and *Crane,* in which the court had concluded:

> ". . . *Crane* and *Heim* are not simply moribund; we believe they are dead. Otherwise the results in *Graham* and *Dougall* could not have been reached." *C. D. R. Enterprises, Ltd.* v. *Board of Education,* 412 F. Supp. 1164, 1170 (E. D. N. Y. 1976).

length.[6] The project is privately funded. From its inception it was intended to serve the vital, congressionally recognized national interest created by critical shortages of domestic oil.[7] This statute thus seeks to exclude United States citizens from private employment in the construction of a distribution system on federal land serving vital national interests. Whatever the viability of the *McCready* doctrine, the proprietary interests of the State are hardly sufficient to justify blatant discrimination against United States citizens in this context.

II.

THE ALASKA HIRE LAW CONSTITUTES AN INVASION BY STATE LAW INTO AN AREA RESERVED TO FEDERAL SUBSTANTIVE LAW AND POLICY UNDER THE NATIONAL LABOR RELATIONS ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI.

Like almost every other private employer performing work on the pipeline project, Peabody-Miller is party to a collective bargaining agreement with a labor organization as the duly

6. *See* Alleyne, "Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction", 2 *U. C. L. A.—Alaska L. Rev.,* 1, n. 20 (1972), in which the consultant to the Joint Pipeline Impact Committee of the Alaska State Legislature states: "The proposed North Slope pipeline will traverse about 130 miles of State land, 640 of federal land, and about 30 miles of privately owned land. . . ." Although the author suggested and the Alaskan Senate considered creating a State leasing board which would lease or acquire easements on land belonging to the federal government and then in turn lease the land so acquired to private contractors (Senate Bill 294, 1972), the plan did not materialize.

In any event, given the obvious problems involved in assigning all-Alaska crews to specific State land locations along the line, the material effect of the statute is to require all-Alaska crews for the entire project.

7. *The Trans-Alaska Pipeline Authorization Act,* 43 U. S. C. § 1651 *et seq.*

recognized bargaining representative of its employees. By requiring Peabody-Miller to first hire and last terminate Alaska residents in preference to any other employees covered by a collective bargaining agreement,[8] the Alaska Hire law contravenes the paramount and most fundamental federal policy enunciated in the National Labor Relations Act:[9] the preservation and encouragement of free collective bargaining.[10]

It is now axiomatic that, in enacting the NLRA, Congress established a unified national labor policy and preempted the entire field of labor relations insofar as it affects interstate commerce. State law is completely inapplicable, except if compatible with federal labor policy. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457, 77 S. Ct. 912, 918 (1957). All that is left to the states to regulate in this area are activities of merely peripheral concern to the NLRA or conduct marked by violence and imminent threats to the public order. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243, 79 S. Ct. 773, 779 (1959).

Without doubt, it is a primary corner-stone of national labor policy that employers and representatives of employees be afforded the fullest opportunity to collectively bargain over terms and conditions of employment free from government influence. This Court has not hesitated to strike down state action which conflicts with this policy:

8. The applicable regulations make it clear that the Alaska Hire Act applies to employment covered by collective bargaining agreements. 8 AAC 35.025, 35.042(2). One regulation, which provided that "[a] complaint from a resident subject to grievance procedures under a collective bargaining agreement will not be accepted until all grievance procedures have been exhausted", was repealed. 8 AAC 35.044(k).

9. 29 U. S. C. § 151 *et seq.*

10. Though Appellants were not in a position to raise the preemption issue below, we urge that the Court consider it. An affirmance of the decision below without reference to this issue would create serious conflicts among federal laws.

> ". . . [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: '[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.'" *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U. S. 132, 153, 96 S. Ct. 2548, 2559 (1976), *citing Teamsters Union* v. *Oliver*, 358 U. S. 283, 296, 79 S. Ct. 297, 305 (1959).

See also Teamster Local 174 v. *Lucas Flour Company*, 369 U. S. 95, 104, 82 S. Ct. 571, 577 (1962).

The Alaska Hire law presents an almost paradigmatic example of state legislation at cross-purposes with the federal labor policy of encouraging free collective bargaining. By requiring employers to hire, terminate or lay off employees solely on the basis of residence, the Alaska Hire law literally precludes meaningful bargaining over some of the most important conditions of employment. Indeed, order of layoff is a term of employment of the most primary concern in collective bargaining and a topic which is "grist in the mills of the arbitrators."[11] There can be no question, therefore, that the focal point of federal labor policy would be frustrated were this statute permitted to stand.

In *Alaska* v. *International Union Local 302*, 393 U. S. 405, 89 S. Ct. 684 (1969), *rehearing denied* 393 U. S. 1112, 89 S. Ct. 858 (1969), *affirming Tyree* v. *Edwards*, 287 F. Supp. 589 (D. Alaska, 1968), this Court was presented with another Alaska statute similar in design and purpose to the Alaska Hire law which was challenged as violative of federal labor policy and the Supremacy Clause. There, the law in question (the "Local Autonomy Act") required that any labor organization having 100 or more members who were residents of Alaska had to charter and establish a local organization in Alaska, the purpose, as here, being to ease Alaska's unemployment prob-

11. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584, 80 S. Ct. 1347, 1354 (1960).

lems by preventing alleged discrimination against residents of Alaska in job referrals. The Local Autonomy Act also provided that the Alaska Commissioner of Labor could exempt from this requirement any labor organization which "maintain[ed] local-hire preference provisions in all of its labor-management agreements in the state. . . ." 287 F. Supp. at 592. This Court, without opinion, affirmed the finding of the three-judge panel that the Local Autonomy Act violated federal labor policy by impermissibly interfering with the collective bargaining process:

> "We conclude that the statutes comprising the Local Autonomy Act, and regulations related thereto, clearly indicated a state purpose which invades a field pre-empted by Congress. Impermissibly, the Act interferes with the full freedom of workers to choose a bargaining agent and in the collective bargaining process . . . . Because of conflict with federal law and policy, both actual and potential, the Act, as amended, is therefore unconstitutional under the Supremacy Clause." 287 F. Supp. at 594.

It is submitted that the Alaska Hire law infringes, no less than the Local Autonomy Act, on an area exclusively reserved to the collective bargaining process. Accordingly, it is similarly violative of the Supremacy Clause.

III.

THE ALASKA HIRE LAW VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE I, § 8 BY PREVENTING QUALIFIED NON-RESIDENT PIPELINE WORKERS FROM MOVING INTO THE STATE FOR THE PURPOSE OF CONSTRUCTING A RESOURCE DISTRIBUTION SYSTEM SERVING A NATIONAL INTEREST.[12]

The commerce clause reserves exclusively to Congress the right to "regulate Commerce with foreign nations, and among

12. While no claim was advanced below that the Alaska Hire law violates the commerce clause of the United States Constitution, Article I, § 8, examination of this question is warranted in order to fully evaluate the constitutional viability of this state legislation.

the several States . . .". It was intended to insure that the United States be a single economic unit without restraints on interstate commercial activity. *See generally, H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525, 532-539, 69 S. Ct. 657, 662-665 (1949). It is settled that the transportation of persons is "commerce" within the meaning of the commerce clause. *Edwards* v. *California*, 314 U. S. 160, 172, 62 S. Ct. 164 (1941). By restricting the movement into Alaska of qualified non-resident workers for the purpose of constructing a privately-funded distribution system to transport a vital resource across state lines, the Alaska Hire law therefore creates "precisely the sort of Balkanization which the Constitution was intended to prevent". *Douglas* v. *Seacoast Products, Inc.*, *supra*, 97 S. Ct. at 1752.

It is also clear that the "natural resource" or ownership exception used by the court below to overcome a privileges and immunities challenge does not begin to provide justification in a commerce clause scrutiny. Indeed, as the lower court acknowledged, as established by *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 43 S. Ct. 658 (1923) and *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564 (1911), Alaska could not lawfully condition the export of "its" oil upon prior satisfaction of the state's local needs, no matter how critical.

Similarly, the specified legislative purpose of the Alaska Hire law—to reduce chronic unemployment within the state[13] —while a matter of legitimate concern, may not justify the burden on interstate commerce created by restricting non-residents from working on the pipeline. This Court has in a number of cases struck down as violative of the commerce clause state statutes and regulations which have attempted to promote local employment by requiring that private employers perform certain work within the state's jurisdiction.[14] Indeed

13. AS 38.40.020.

14. *See Toomer* v. *Witsell*, *supra*, holding unconstitutional a South Carolina statute requiring all shrimp boats in the state's waters

(Footnote continued on next page.)

this Court has indicated that, despite the legitimate local interest, statutes whose express or concealed purpose is to preserve or secure employment for the home state create a "particular burden on commerce [which is] virtually *per se* illegal." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145, 90 S. Ct. 844, 849 (1970). The Alaska Hire law pursues the same ends, *i.e.*, promotion of local employment; its means are even more inherently discriminatory.[15]

(Footnote continued from preceding page.)
to dock at a state port to unload and pack their catches; *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U. S. 361, 84 S. Ct. 387 (1963), holding unconstitutional Florida regulations which required Florida milk processors to accept their total supply of Class I milk from designated state producers at a fixed price; and *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 49 S. Ct. 1 (1928) striking down a Louisiana statute requiring that shrimp taken in state waters be processed in the state prior to shipment. *See also Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497 (1934).

15. *In Brown* v. *Anderson*, *supra*, 202 F. Supp. at 103, a three-judge panel of the Federal District Court of Alaska struck down on the basis, *inter alia*, of the commerce clause Alaska legislation designed to temporarily restrict the entry of non-resident fishermen into certain fishing areas in order to prevent possible destitution of residents in those areas. Citing *Edwards* v. *California*, *supra*, the panel concluded:

> ". . . It has been held, as defendants point out, that the actual taking of fish is a local activity . . . But that is only one step in the whole process resulting in the shipment of the finished canned product.
>
> "A substantial number of fishermen are from States other than Alaska. They move in 'interstate commerce' as that term has been defined. The provisions of Chapter 62 do not prevent, but restrict that movement. Its provisions do place a burden on the movement in interstate commerce of nonresident fishermen, who must of necessity be transported annually.
>
> . . . .
>
> "We hold that Ch. 62, SLA 1961 violates Article I, § 8, Cl. 3 of the Constitution." *Id.*

It is submitted that this reasoning is eminently applicable to the case at bar.

The foregoing authority points to the inescapable conclusion that the Alaska Hire law cannot be reconciled with the concept of federalism which the commerce clause was designed to preserve. If Alaska can reserve to its residents all employment arising from utilization of its natural resources, there would be nothing preventing every state in the Union from doing the same. Each state, on the grounds of local economic or social problems such as unemployment or destitution, could close its doors to citizens of other states seeking employment in resource-related industries such as agriculture, fishing, mining and lumber, as well as processing, manufacturing or distribution industries related thereto. The effect would be to reduce the nation into separate economic enclaves and all but destroy the fabric binding the states into a single economic unit.

IV.

THE ALASKA HIRE LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY SUBJECTING PEABODY-MILLER TO ARBITRARY AND DISCRIMINATORY REGULATION WHICH INTERFERES WITH ITS ORDINARY AND LAWFUL BUSINESS OPERATIONS.

While joining Appellants in urging reversal on the grounds that the Alaska Hire law unlawfully discriminates against non-residents of the State of Alaska, Peabody-Miller submits that this legislation impermissibly discriminates against employers of non-residents in violation of the equal protection clause by subjecting them to extremely heavy penalties solely because of such employment relationship.[16]

As already noted, benefiting the economic interests of residents is not a permissible state purpose which may avoid the

---

16. Business corporations such as Peabody-Miller, although not citizens, are "persons" and thus entitled to equal protection of the laws under the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, *supra*.

strictures of the privileges and immunities clause, even when the legislation is motivated by severe local unemployment problems. Moreover, as the Alaska Supreme Court previously recognized, legislation aimed at increasing the number of jobs available to Alaskans via exclusion of non-residents violates the equal protection clause as well:

> "A discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses. While the former applies to 'citizens' and the latter to 'persons', both are aimed at preventing invidious discrimination." *Lynden Transport Inc. v. Alaska*, 532 P. 2d 700, 710 (Alaska, 1975).[17]

Finally, recent decisions of this Court indicate that state legislation penalizing employers for employing aliens on projects funded by the state clearly violates the equal protection clause. *Lefkowitz v. C. D. R. Enterprises, supra; Sugarman v. Dougall, supra; Graham v. Richardson, supra.* It would be anomalous indeed if a state statute penalizing employers who hire non-resident United States citizens on privately funded projects of national scope were allowed to stand.

17. *See also Brown v. Anderson, supra*, at 102; *Edwards v. Leaver*, 102 F. Supp. 698 (D. R. I. 1952) (striking down on the basis of the equal protection clause a state statute restricting licensing for commercial fishing to corporations 51% of whose stock was owned by legal residents and providing heavy penalties for violations).

CONCLUSION.

It is submitted that the Alaska Hire law and regulations promulgated thereunder are unconstitutional in that they violate the privileges and immunities, supremacy, commerce and equal protection clauses of the United States Constitution.

The decision below, insofar as it upholds the Alaska Hire law, should therefore be reversed.

Respectfully submitted,

RICHARD L. MARCUS,
IRVING M. GESLEWITZ,
ADAMS, FOX, MARCUS,
ADELSTEIN & GERDING,
Attorneys for Peabody Testing—Bill Miller X-Ray, Inc., Amicus Curiae.

December 31, 1977.

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPELLEES' OBJECTION TO BRIEF OF PEABODY TESTING – BILL MILLER X-RAY, INC., *AMICUS CURIAE* (FOR APPELLANTS)

RONALD W. LORENSEN

OFFICE OF THE ATTORNEY GENERAL
Pouch K, State Capitol
Juneau, Alaska 99811

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPELLEES' OBJECTION TO BRIEF OF PEABODY TESTING – BILL MILLER X-RAY, INC., *AMICUS CURIAE* (FOR APPELLANTS)

STATEMENT OF OBJECTION

The *Brief of Peabody Testing–Bill Miller X-Ray, Inc., Amicus Curiae (for Appellants)* was received in the Office of the Attorney General for the State of Alaska on January 6, 1978. The undersigned counsel for appellees was out of state at the time the *Brief, etc.* was received and did not learn of it or have an opportunity to review it until January 9, 1978.

Although the undersigned had originally granted his consent to counsel for Peabody Testing-Bill Miller X-Ray, Inc. (hereinafter "Peabody-Miller") to file a brief *amicus curiae* in this case, that consent was conditioned on Peabody-Miller's limiting the scope of its brief to those issues properly raisable from the decision of the Alaska Supreme Court. 565 P.2d 159 (1977).[1] It is apparent from even a cursory review of Peabody-Miller's brief, however, that the issues raised by it go far beyond that limitation. Therefore, we feel compelled to object, pursuant to Rule 42.3 of the Rules of the Supreme Court of the United States, to Peabody-Miller's brief *amicus curiae.*

The brief of Peabody-Miller raises issues neither raised nor pressed by the appellants in the Court below. These issues include asserted violations of the Supremacy Clause of the United States Constitution, asserted interference with the free flow of labor in inter-state commerce, in violation of the Commerce Clause, and asserted arbitrary and discriminatory regulation based on "extremely heavy penalties" for failure to comply with the Alaska Hire law, AS 38.40, in violation of the equal protection clause of the 14th Amendment to the United States Constitution. The Alaska Supreme Court had not been presented with those issues when it decided the case; nor was it presented with a factual record which would have permitted it to do so.[2]

---

[1]The contents of our letter to counsel for Peabody-Miller which accompanied our consent form are set out in the Appendix to this Objection.

[2]For instance, had the issue of Alaska Hire's interfering with federal labor law under the Supremacy Clause been raised at the trial court level, the State would have demonstrated that no such interference in fact arose; that both unions and management freely agreed to carry out their hiring procedures in accordance with Alaska Hire; that the General Counsel to the National Labor

[footnote continued]

This Court has made it clear that it will not undertake to review that which a Court below did not decide. *Walters v. St. Louis,* 347 U.S. 231, 233, 98 L.Ed. 600, 74 S.Ct. 505 (1954). The brief of Peabody-Miller proposes that the Court do precisely that, however, and it is for this reason that we now object to that brief *amicus curiae* and respectfully request that it be excluded and disregarded by the Court. Peabody-Miller must wait until after the State of Alaska determines, if it does, that Peabody-Miller violated the provisions of Alaska Hire. At that point it may, assuming it considers its constitutional objections to be of merit, raise its claims in defense to such a determination by appealing that decision in accordance with established procedures for appeals of final decisions of administrative agencies in Alaska.

DATED: _____

Respectfully submitted,

By: RONALD W. LORENSEN
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL

Relations Board issued an opinion stating that unions may, consistent with the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, establish dispatch precedures which were in accord with Alaska Hire; that union contracts covering work subject to Alaska Hire did not provide for a lay off procedure which was inconsistent with Alaska Hire; and that, with respect to Peabody-Miller, the union representing its X-ray technicians *sought* to dispatch Alaska residents to Peabody-Miller, but that the employer refused to accept them.

APPENDIX

December 28, 1977

Mr. Richard L. Marcus
Adams, Fox, Marcus & Adelstein
208 S. LaSalle Street
Suite 1278
Chicago, Illinois 60604

Dear Mr. Marcus:

This is in response to your letter dated December 16, 1977, requesting written confirmation of my consent to your filing a brief amicus curiae on behalf of Peabody Testing – Bill Miller X-Ray in the case of *Hicklin v. Orbeck*, No. 77-324, now pending in the Supreme Court of the United States.

As attorney for the appellee in that case, I hereby give such consent, so long as your brief addresses only issues and matters properly raisable from the Alaska Supreme Court decision in the case.

Sincerely yours,

OFFICE OF THE
ATTORNEY GENERAL

By:
Ronald W. Lorensen
Assistant Attorney General

RWL:jf

Supreme Court, U. S.
FILED
JAN 31 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

BRIEF OF AMICUS STATE OF HAWAII ~~IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR AFFIRM~~

DEPARTMENT OF THE
ATTORNEY GENERAL
STATE OF HAWAII

RONALD Y. AMEMIYA
Attorney General
State of Hawaii
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

LAWRENCE D. KUMABE
MICHAEL A. LILLY
Deputy Attorneys General
State of Hawaii
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Attorneys for Amicus Curiae State of Hawaii

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICUS	1
OPINION BELOW	4
ARGUMENT	4
I. THE ALASKA HIRE LAW DOES NOT DENY APPELLANTS EQUAL PROTECTION OF LAW	4
A. The Alaska Hire Law does not affect fundamental rights or suspect classifications to justify the use of strict judicial scrutiny	4
B. The Alaska Hire Law has a rational basis and is, therefore, constitutionally valid	6
II. THE ALASKA HIRE LAW DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION (ART. IV, SEC. 2)	9
A. The Alaska Hire Law does not violate any fundamental rights protected by the privileges and immunities clause	10
B. The Alaska Hire Law has an independent rational basis	11
CONCLUSION	12
APPENDIX	App. 1

TABLE OF AUTHORITIES

Cases

Board of Regents v. Roth
408 U.S. 564, 92 S. Ct. 2701,
33 L.Ed.2d 548 (1972) 11

Construction Industry Association v. Petaluma
522 F.2d 897 (CA 9, 1975) cert. den. 424 U.S. 934 9

Page

Corfield v. Coryell
6 F.Cas. 546 (No. 3230) (C.C.E.D.Pa. 1823) 10

Geer v. Connecticut
161 U.S. 519, 40 L.Ed. 793 (1896) 10

Hicklin v. Taylor
(Unpublished opinion of Supreme Court of Alaska, dated June 3, 1977) 4, 6

Massachusetts Board of Retirement v. Murgia
427 U.S. 307, 49 L.Ed.2d 520 (1976) 5, 11

McCready v. Virginia
94 U.S. 391, 24 L.Ed. 248 (1877) 10

San Antonio School Dist. v. Rodriguez
411 U.S. 1, 36 L.Ed.2d 16 (1973) 4, 5

State v. Adams
522 P.2d 1125 (1974) 5

Toomer v. Witsell
334 U.S. 385, 92 L.Ed. 1460 (1948) 11

Village of Belle Terre v. Boraas
416 U.S. 1, 94 S. Ct. 1536, 39 L.Ed.2d 797 (1974) 8

Vlandis v. Kline
412 U.S. 441, 37 L.Ed.2d 63 (1973) 5

Ybarra v. City of Los Altos Hills
503 F.2d 250 (CA 9, 1974) 8

Constitutions

United States Constitution
Art. IV, Sec. 2 ..... 4, 9, 10

Hawaii Constitution
Art. VIII, Sec. 1 8

Page

Rules

Supreme Court Rules
Rule 42 1

Statutes

Alaska Statutes 2
Sec. 38.40 2
Sec. 38.40.010 2
Sec. 38.40.020 2

Hawaii Statutes
Sec. 78-1 ..... 3, 7

Text

Restatement (Second) of Conflict of Laws (1971) 5

In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

BRIEF OF AMICUS STATE OF HAWAII IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR AFFIRM

INTEREST OF AMICUS

This brief *amicus curiae* on behalf of the State of Hawaii (hereinafter "Hawaii") is respectfully submitted pursuant to Supreme Court Rule 42 by Ronald Y. Amemiya, Attorney General for the State of Hawaii, and Lawrence D. Kumabe and

Michael A. Lilly, Deputy Attorneys General. The State of Hawaii believes that for the reasons stated herein, this Court should affirm the judgment of the Supreme Court of Alaska or, alternatively, dismiss the appeal pursuant to Supreme Court Rule 16.

The State of Hawaii is gravely concerned about the issues raised by this appeal. The Alaska statutes challenged herein, A.S. 38.40 (hereinafter the "Alaska Hire Law"), were specifically enacted by the Legislature of the State of Alaska to help to resolve chronic unemployment within the state, due both to cultural and geographical migration barriers.[1] The Alaska Hire Law also implements Alaska's need to develop its human resources to their fullest potential by providing maximum employment opportunities to its residents.[2]

Hawaii, like Alaska, shares similar problems and similar concerns. Like Alaska, it is unique from other states because of its geographic isolation from the rest of the United States. Moreover, Hawaii also has a unique and significant cultural and ethnic composition and a very high rate of unemployment.

This means that migrant job-seekers pose problems for

[1]Sec. 38.40.020, Alaska Statutes, provides:
"LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are non-recurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state."

[2]Sec. 38.40.010, Alaska Statutes, specifically provides:
"STATE POLICY. It is the policy of the state in development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management."

local residents in Alaska and Hawaii faced by very few other states. If an in-migrant takes a job from a local resident, during a period of high unemployment, that local resident may not have the financial or cultural resources to bear the financial and psychic cost of out-migrating to another state. A vast expanse of ocean separates Hawaii from the mainland United States. An Alaskan resident must migrate across Canada. These problems are particularly severe for the chronically unemployed local resident. With increased in-migration, higher unemployment results. More people must be supported at public expense.

In Hawaii, these problems are compounded by a severely limited geographical area and increasingly severe water shortages and alarmingly high levels of air and water pollution. Over-population may ultimately mean the demise of Hawaii's visitor industry, which substantially relies on the state's natural beauty to maintain its attractiveness as a tourist destination. In 1976, visitor expenditures totalled $1.45 billion, defense expenditures $1.03 billion, while sugar produced only $252 million in income for the state and pineapple production generated $120 million.

Consequently, the Legislature of the State of Hawaii, like Alaska's legislature, has also enacted restrictions on public employment requiring Hawaii residency for the vast majority of public jobs. See Appendix 1, §78-1, Hawaii Revised Statutes.

If the Alaska Hire Law is struck down, not only will chronic unemployment rise, but a state, having lost control over its ability to maintain the welfare of its people, would be powerless to avoid the onset of an economic recession, aggravated by migrant job-seekers.

Appellants, in their Jurisdictional Statement, have spoken in very lofty terms of "parochialism" or "Balkanization." (Appellants' Jurisdictional Statement, at p. 20.) However, these concerns are rather academic in states like Alaska and Hawaii where the effects of uncontrolled in-migration have immediate

and telling effects on the health and well-being of state residents. Moreover, Appellants have pointed to no authority that has upheld a constitutional attack on statutes merely requiring state residency for employees hired for public jobs.

The State of Hawaii, as *amicus curiae*, cannot more strongly urge this Court to either dismiss the appeal or affirm the judgment of the Supreme Court of Alaska.

OPINION BELOW

The Alaska Supreme Court in *Hicklin v. Taylor*, (appearing in Appellants' Jurisdictional Statement, Appendix 1), while it struck down the one-year durational residency requirement contained in the Alaska Hire Law, merely held that the preferences contained in the statutes requiring Alaska residents to be hired before non-residents by employers holding oil and gas leases from the State of Alaska were constitutionally valid.

ARGUMENT

I. THE ALASKA HIRE LAW DOES NOT DENY APPELLANTS EQUAL PROTECTION OF THE LAW.

At the outset, it is important for this Court to note that the Appellants have abandoned their equal protection attack on Alaska's Hire Law, in this appeal in favor of a constitutional attack utilizing the privileges and immunities clause (Art. IV, Sec. 2) of the United States Constitution. However, Appellants still cannot avoid the body of clearly defined law developed in equal protection cases, by utilizing an approach where constitutional analysis is still rather vague.

A. The Alaska Hire Law does not affect fundamental rights or suspect classifications to justify the use of strict judicial scrutiny.

The parameters for the equal protection test has been clearly set forth by this Court first in *San Antonio School Dist. v. Rodriguez*, 411 U.S.1, 36 L.Ed.2d 16 (1973) and more recently in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed.2d 520 (1976). First, the inquiry is whether fundamental rights are affected by the challenged statutory classification. Next, it must be determined whether any suspect classes of individuals are involved who had previously been subject to invidious discrimination. If either fundamental rights are involved or suspect classifications, strict judicial scrutiny of the statute is required. If not, then the less stringent rational basis test must be used.

The Alaska Hire Law clearly does not affect any fundamental rights. While an *entire* occupation or calling cannot be foreclosed from non-residents by denying them occupational licenses, there is no concurrent fundamental right to public employment. *Massachusetts Board of Retirement v. Murgia*, *supra*. This logically extends to private employers holding public leases, as is the case with the Alaska Hire Law.

This position is eminently reasonable. The State of Alaska, acting in its proprietary capacity as a lessor has a direct interest in the maintenance and development of a stable, qualified work force within the state to increase its economic well-being and further develop its resources. Consequently, it can legitimately set terms and conditions of employment for employees of employers holding public leases.

Residence within the state is hardly an unreasonable job restriction. In order to be a resident, it is necessary to at least establish a domicile in the state. *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973); *State v. Adams*, 522 P.2d 1125 (1974). One also must intend to be a permanent resident of the state.[3] An individual with no domicile or intention to reside within the state would hardly be an employee who could be expected to remain in the state and continue to contribute to its economy. The state has no interest in developing an economy based largely on a transient, migrating work force.

[3]See Restatement (Second) of Conflict of Laws §18 (1971).

In addition, the Alaska Hire Law clearly does not involve any suspect classifications. While race or alienage constitute classifications either of a permanent or long-standing nature, residency cannot possibly be characterized in the same way. It is easy to change residency. Only a few months in the intended state of residence will at most be necessary. Moreover, non-residents can hardly claim to have suffered from a long history of invidious discrimination.

Because neither fundamental rights nor suspect classifications were involved, the Alaska Supreme Court clearly did not err in subjecting the statutes at issue in the instant case to the rational basis test, rather than requiring strict judicial scrutiny, in upholding the Alaska Hire Law.

B. The Alaska Hire Law has a rational basis and is, therefore, constitutionally valid.

Before proceeding to consider Appellants privileges and immunities argument, it is instructive to examine the rational basis behind the Alaska Hire Law. In explaining the basis for the law, the Alaska Supreme Court also addressed the justification for the statute for purposes of rebutting the privileges and immunities attack. In *Hicklin v. Taylor*,[4] the Alaska Supreme Court said:

> "*McCready v. Virginia*, *supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not."

[4]See Appellants' Jurisdictional Statement, Appendix I (Unpublished Opinion of Alaska Supreme Court, dated June 8, 1977).

The Court went on to say:

> "We rely on the *McCready* 'natural resources exception' to the privileges immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the 'independent reasons' exceptions to the privileges and immunities clause articulated in the quotation from *Toomer*, *supra*. The trial judge referred to Alaska Hire as an attempt to solve 'problems that may be typified as social, racial, educational, and economic.' We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L.Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns."

Similarly, in Hawaii the 1977 Session of the Hawaii Legislature enacted Act 211, Session Laws of Hawaii, which provided for a one-year durational residency requirement for public employment.[5] Like the State of Alaska, the State of Hawaii was concerned about the preservation of its far from abundant resources and controlling rampant unemployment within the state. Preserving public jobs for state residents was also viewed as a means to attempt to check the flood of in-migrants who would only add to the state's increasing unemployment and escalating welfare costs.

The exercise of police power to preserve the character of a particular region, its open spaces and low density of popula-

[5]See Appendix I.

tion; and to grow at an orderly and deliberate pace is not unconstitutional. *Construction Industry Association v. Petaluma*, 522 F.2d 897 (CA 9, 1975) cert. den. 424 U.S. 934; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) and *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (CA 9, 1974). The Constitution of Hawaii explicitly mandates that the State act in these areas. Section 1, Article VIII of the Constitution provides, "The State *shall* provide for the protection and promotion of public health." Section 5 of this same article further provides, "The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order. . . ."

In Hawaii, a uniquely insular community which has limited land area, population growth can be the source of many social, economic, and public welfare problems. People consume resources and create waste. More people, more resources consumed and more waste created. People take up space; more people, less space and more crowding. People require shelter; more homes, less land for agriculture or other alternate uses.

Population changes in the State have various components:
A. Births in State
B. Deaths in State
C. In-migration
D. Out-migration

Births and in-migration increase the population. Deaths and out-migration decrease the population. Attempting to control the growth of population by *directly* controlling birth and death rates would be constitutionally and no doubt morally reprehensible.

This leaves influencing in-migration and out-migration. Conceivably, a State could promote out-migration. But, besides the fact that the Hawaii Legislature has chosen not to take this approach, several other considerations would seem to mitigate against this method of controlling growth. For example, the public costs could be exorbitant and various factors which may tend to encourage out-migration may also detract from the attractiveness of Hawaii as a tourist attraction. This leaves only legislation influencing in-migration, such as the Alaska Hire Law.

Hawaii, like Alaska, is faced with the real prospect of irretrievably losing many of its natural assets vital to its welfare unless immediate action is taken.

The Alaska Hire Law has a clear rational basis in giving a state the means to avoid becoming a depressed area, with a population far out of proportion to its resources. The State of Hawaii submits that the statute meets valid, legitimate state interests. These interests must be addressed by the states while the Congress of the United States for the first time in our nation's history must attempt to address the problems created by a continually increasing population and rapidly diminishing natural resources.

These twin problems of finite resources and of population growth and redistribution must ultimately be addressed. If these concerns are submerged, if states like Alaska and Hawaii are unable to respond to these problems merely because a few appellants talk in overly strident tones of "Balkanization" or "parochialism," then the states could very well forget about the Federal system that was created to meet their often very individual needs, while they await further Congressional action.

II. THE ALASKA HIRE LAW DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION (ART. IV, SEC. 2).

We now turn to Appellants' privileges and immunities attack. Because the authority in this area is far from clear, it is too easy to lose sight of the fact that the constitutional analysis under the privileges and immunities clause is very similar to an equal protective analysis.

In general, the analysis requires:

1. The privileges and immunities allegedly denied must be fundamental rights of citizens within the state.

2. If certain fundamental rights are affected, the statutory classification may still be constitutionally valid, if there is a legitimate, independent reason supporting the statute.

Because no fundamental rights are being denied to Appellants and because the Alaska Hire Law has a valid, rational basis for the classifications created by the statute, the State of Hawaii respectfully submits that the statute must be upheld and the decision of the Supreme Court of Alaska affirmed.

A. The Alaska Hire Law does not violate any fundamental rights protected by the privileges and immunities clause.

Both the Appellants in their jurisdictional statement and Appellees in their motion for dismissal or affirmance in the instant case apparently accept the definition of "privileges and immunities" set forth in the opinion of Mr. Justice Bushrod Washington, sitting on circuit in 1823 in *Corfield v. Coryell*, 6 F.Cas. 546, 551-52, (No. 3230) (C.C.E.D. Pa. 1823). It is, he said, limited to "those privileges and immunities which are, in their nature, fundamental." It includes "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Accord*, *Geer v. Connecticut*, 161 U.S. 519, 40 L.Ed. 793 (1896); *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877).

Consequently, if public employment or employment by an employer holding a public lease is not a fundamental right for purposes of equal protection, it is difficult to see how public employment with the state can be a fundamental right for purposes of a privileges and immunities analysis. This Court has repeatedly held that there is no fundamental right to a

public job, nor is there any property right inherent in a public job for purposes of due process, merely because an individual applies for the job. *Massachusetts Board of Retirement v. Murgia*, *supra*; *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

It is also important to remember that no suspect classifications, such as sex, race, or alienage are at issue.

Consequently, the cases cited by Appellants are inapposite. They concern fundamental rights only as applied to either interstate commerce or alienage, not public employment.

B. The Alaska Hire Law has an independent, rational basis.

Moreover, the Alaska Hire Law has an independent, rational basis. See *Toomer v. Witsell*, 334 U.S. 385, 92 L.Ed. 1460 (1948). Not only does it satisfy the reasons we have already set forth above, but it serves both the State's policy of maintaining a stable work force as an employer and distributing scarce economic resources to state residents, and discouraging in-migrants who might otherwise re-locate only to find that they cannot in turn find a job or who might keep an Alaskan resident unemployed, who would still have to be supported at public expense.

CONCLUSION

Based on the points and authorities above-cited, the State of Hawaii as Amicus Curiae respectfully urges that this Court either dismiss this appeal or affirm the judgment of the Supreme Court of Alaska.

RESPECTFULLY SUBMITTED, at Honolulu, Hawaii, this 27th day of January, 1978.

Respectfully submitted,

DEPARTMENT OF THE
ATTORNEY GENERAL
STATE OF HAWAII

RONALD Y. AMEMIYA
Attorney General
State of Hawaii

LAWRENCE D. KUMABE
MICHAEL A. LILLY
Deputy Attorneys General
State of Hawaii

Attorneys for Amicus Curiae
State of Hawaii

Appendix 1

ACT 211 S.B. NO. 1350

A Bill for an Act Relating to Residency Requirements for Public Employment.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 78-1, Hawaii Revised Statutes, is hereby amended to read as follows:

"Sec. 78-1 Citizenship and residence of government officials and employees; exemptions. (a) All officers, whether elective or appointive, in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens of the United States and residents of the State for at least three years immediately preceding their appointment.

(b) All employees in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens, nationals or permanent resident aliens of the United States and residents of the State for at least one year immediately preceding their application for employment.

(c) For the purpose of obtaining services which are essential to the public interest for which no competent person with the qualifications under subsection (b) applied within forty-five days after the first publication of an advertisement of the position or a notice of an examination therefor, which advertisement or notice has been published more than once, and not oftener than once a week, in a newspaper of general circulation in the State, a person without the qualifications may, upon prior certification by the state director of personnel services of the city and county director of civil service or the county personnel director, whichever is applicable, and with the approval of the chief executive officer for the State or the political subdivision concerned, be employed.

(d) The requirement of residency, as defined under subsec-

tion (b) above, shall not apply to a resident who was a resident of the State for at least one year immediately before marrying a non-resident and who continues to reside in the State.

(e) For the positions involved in the performance of services in planning and executing measures for the security of Hawaii and the United States, the employees shall be citizens of the United States in addition to meeting the requirement of residency in subsection (b).

(f) The requirement of residency, as defined under subsection (b) and the requirements of subsection (c) shall not apply to persons recruited by the University of Hawaii under the authority of Chapter 304-11; provided however, that all persons recruited as Administrative/Professional/Technical personnel of the University of Hawaii shall be subject to the requirement of residency; provided further that appointment of persons to positions requiring highly specialized technical and scientific skills and knowledge may be made without consideration of residency.

SECTION 2. **Severability.** If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 4. This Act shall take effect upon its approval.

(Approved June 21, 1977.)

---

*Edited accordingly.

AFFIDAVIT OF SERVICE

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

I, LAWRENCE D. KUMABE, being duly sworn, on oath deposes and says that copies of the Brief hereof were served upon the following persons in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States by mailing the same to them, by air mail postage prepaid, at the following addresses on January 27, 1978:

ROBERT H. WAGSTAFF, ESQ.
Wagstaff and Middleton
500 L Street
Anchorage, Alaska 99501

Counsel for Appellants

RONALD W. LORENSON, ESQ.
and
RICHARD M. BURNHAM, ESQ.
Assistant Attorneys General
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for Appellees

/s/ LAWRENCE D. KUMABE
MICHAEL A. LILLY
Deputy Attorneys General

Attorneys for Amicus Curiae
State of Hawaii

Subscribed and sworn to before
me this 20th day of January 1978.

/s/ MAY M. C. YOUNG
Notary Public, First Judicial
Circuit, State of Hawaii
My commission expires: May 16, 1980

MOTION FILED
DEC 29 1977

Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, *et al.*,

Appellants,

v.

EDMUND ORBECK, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALASKA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

Attorney for the National Right to Work Legal Defense Foundation

29 December 1977

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, *et al.*,

Appellants,

v.

EDMUND ORBECK, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALASKA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, the National Right To Work Legal Defense Foundation hereby moves for leave to file the annexed brief *amicus curiae*, urging that this Court reverse the decision of the Supreme Court of Alaska.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is a charitable corporation the purpose of which is to provide legal assistance to employees who have suffered deprivations of constitutional, statutory, or common-law rights arising out of compulsory unionism. Much of the litigation which the Foundation supports is concerned with the "right to work", the freedom of every wage-earner to pursue his trade or profession unencumbered by governmentally imposed conditions or requirements unrelated to *bona fide* occupational qualifications for employment. The Foundation sees in this case, and particularly in the holding of the Supreme Court of Alaska that the "right to work" is not "fundamental", a matter for grave concern. First and foremost, the decision of the Alaska Court undermines and threatens the rights, privileges, and immunities of many wage-earners now pursuing judicial and other legal relief against the abuses of compulsory unionism with the aid of the Foundation. In addition, that decision has a wide-ranging significance to all Americans. In an era characterized by economic stagnation, inflation, and unemployment, the predictable response of local and state law-makers to the economic difficulties with which they are beset is to turn to protectionism and restrictionism in an attempt, howsoever futile it may be, to insulate their communities from national problems. Thus, if the attitude of the Alaska Court towards the "right to work" gains currency and legitimacy, not only further abuses of compulsory unionism, but also other forms of restrictionism and protectionism will find increasing favor

among local leaders, encouraging (if not resulting in) an economic "feudalization" of industry, with incalculable burdens upon wage-earners as one necessary concomitant.

The Foundation believes that the Appellants are seriously and skillfully defending their interests. None the less, it fears that their natural preoccupation with the issues of most immediate relevance to them may so narrow the focus of their attention as to cause them to overlook or insufficiently to emphasize to this Court issues of more wide-ranging implication and consequence. One of these issues, which the Foundation intends to discuss in its annexed brief *amicus curiae*, is the interrelation of the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. The Foundation believes that this interrelation is of great significance, not only in the instant case, but also in constitutional jurisprudence generally. It submits, therefore, that its participation as *amicus curiae* will materially assist this Court in deciding the questions before the bench – both with justice for the litigants, and with a proper concern for the effects of the Court's decision in the long term.

Respectfully submitted,

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
Attorney for the National Right to Work Legal Defense Foundation

29 December 1977

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The most fundamental of all constitutional guarantees is the freedom of each citizen, on the basis of legal equality with all other citizens, to offer and accept contracts of employment in the trade or profession for which he is qualified 4

A. Freedom of contract is perhaps the most pervasive of all the constitutional principles which secure autonomy and independence to the individual 4

B. The Thirteenth Amendment specifically guarantees an equal freedom of contract in employment to everyone in the United States 9

1. The Thirteenth Amendment guarantees the freedom to contract for employment in order to eradicate the primary badge and incident of slavery 12

2. The Thirteenth Amendment secures equal protection in the exercise and enjoyment of the freedom to contract for employment 18

II. Article IV, §2 denies a state any power to discriminate in favor of its own citizens with respect to the freedom to contract for employment in the common callings of interstate commerce 24

Page

A. Freedom of contract in employment is among the privileges and immunities which Article IV, §2 secures against state discrimination 25

B. A state may not grant a monopoly of employment to its own citizens where that employment involves interstate commerce 27

III. A state which discriminates in favor of its own citizens with respect to freedom of contract in employment frustrates operation of the national labor market which the Commerce Clause established and protects 31

A. A state may not impede the free flow of labor in interstate commerce in order to benefit its own economy 31

B. A violation of Article IV, §2 with respect to freedom of contract in employment constitutes a burden on commerce 33

IV. Because it denies freedom of contract in employment and frustrates operation of the national labor market, Alaska Hire is repugnant *per se* to the Equal Protection Clause of the Fourteenth Amendment and to Article IV, §2 35

A. Alaska Hire discriminatorily limits freedom of contract in employment on a basis not rationally related to *bona fide* work qualifications, contrary to the Equal Protection Clause of the Fourteenth Amendment 36

B. Alaska Hire impedes interstate commerce in labor services, contrary to Article IV, §2 38

CONCLUSION 39

TABLE OF AUTHORITIES CITED

Cases *Page*

Anderson v. Poindexter, 6 Ohio St. 622 (1857) 16

Bailey v. Alabama, 219 U.S. 219 (1911) 9

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 32

Blyew v. United States, 80 U.S. (13 Wall.) 581 (1872) 12

Board of Retirement v. Murgia, 427 U.S. 307 (1976) 8

Civil Rights Cases, 109 U.S. 3 (1883) 10,16

Edwards v. California, 314 U.S. 160 (1941) 32,34

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 30,32

Geer v. Connecticut, 161 U.S. 519 (1896) 29

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 25

Gist v. Toohey, 2 Rich. 424 (S.C. 1846) 16

Griffin v. Breckenridge, 403 U.S. 88 (1971) 12,24

Hall v. United States, 92 U.S. 27 (1876) 16

Hodges v. United States, 203 U.S. 1 (1906) 10,16

H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) 32

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 12,13,16

LaTourette v. McMaster, 248 U.S. 465 (1919) 36

Leisy v. Hardin, 135 U.S. 100 (1890) 32

McCready v. Virginia, 94 U.S. 391 (1877) 29

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 33

National League of Cities v. Usery, 96 S. Ct. 2465 (1976) 29

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 27

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 30,39

Plessy v. Ferguson, 163 U.S. 537 (1896) 15

Page

Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956) 34
Shafer v. Farmers Grain Co., 268 U.S. 189 (1925) 33
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 10,23, 25,26
Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) 32
State v. Van Lear, 5 Md. 91 (1853) 16
Toomer v. Witsell, 334 U.S. 385 (1948) 27,28
Truax v. Raich, 239 U.S. 33 (1915) 9,28
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) 27,34
West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 30,39

Constitutional Provisions and Statutes

Articles of Confederation 25

Alaska Stat.
§35.020(b,c) 37
§35.090(12) 37
§38.40.010 37
§38.40.020 37
§38.40.030 37
§38.40.060(b) 37
§38.40.090(3) 36
§38.40.090(5) 36

Civil Rights Act of 1866 13

United States Constitution
Article I, §8 2-3,30-31,33-35,38-39
Article IV, §2 2-3,24-31,33-36,38-39
First Amendment 6-7
Second Amendment 7
Ninth Amendment 7
Thirteenth Amendment 2-3,7-24,26-27,31,33-38
Fourteenth Amendment 2-3,9,26,35-37,39

Page

Miscellaneous

T. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America* (1858) 16

Cong. Globe
38th Cong., 1st Sess. (1864) 11,14,19-20
38th Cong., 2nd Sess. (1864-1865) 14,19,26
39th Cong., 1st Sess. (1865-1866) ... 10-15,17-18,21,23,26

W.W. Crosskey, *Politics and the Constitution in the History of the United States* (1953) 26

T. Hoff, *Economic Calculation in the Socialist Society* (1949) 33

L. von Mises, *Bureaucracy* (1944) 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, *et al.*,

Appellants,

v.

EDMUND ORBECK, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALASKA

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

The National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of Appellants Sidney S. Hicklin, *et al.*, urging this Court to reverse the decision of the Alaska Supreme Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The interest of the National Right to Work Legal Defense Foundation in participating as *amicus curiae* in this case appears in the Motion for Leave to File Brief Amicus Curiae submitted herewith.

SUMMARY OF THE ARGUMENT

This case involves the interrelation of the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. The Thirteenth Amendment guarantees equal protection in the exercise and enjoyment of the freedom to contract for employment, and recognizes this freedom as "fundamental" in character. Because of its source in the Thirteenth Amendment, the freedom to contract for employment is a privilege of national citizenship. It is also an essential element of commerce in labor services among the states. Alaska Hire denies citizens of states other than Alaska an equal legal opportunity to contract for employment in an industry of that state which participates in interstate commerce. This denial violates the Equal Protection Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV, §2.

ARGUMENT

Although the Supreme Court of Alaska considered the "right to work" of little importance to its decision to uphold the constitutionality of Alaska Hire, that concept, rightly understood, is central to this case — because it explains the unique integration of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. In this regard, we shall demonstrate four things: *First*, the Thirteenth Amendment guarantees to all persons in the United States an equal freedom to offer and accept contracts for employment. *Second*, this equal freedom of contract in employment is one of the privileges and immunities which Article IV, §2 secures against discriminatory state action. *Third*, denial to the states of any power to interfere with freedom of contract in employment is necessary to protect interstate commerce from the stifling effects of local protectionist legislation. *Fourth and last*, by discriminatorily denying qualified citizens of other states the freedom to offer and accept contracts for employment in an industry inextricably connected with interstate commerce, Alaska Hire denies them equal protection of the laws, and deprives them of a privilege of national citizenship.

I.

The most fundamental of all constitutional guarantees is the freedom of each citizen, on the basis of legal equality with all other citizens, to offer and accept contracts of employment in the trade or profession for which he is qualified.

To deal adequately with the issues which this appeal presents, we must advert at some length to constitutional principles and provisions so fundamental that their teachings and directing influence on the course of adjudication are generally taken for granted – until, as in this case, a lower court disregards them. The constitutional principle with which we shall concern ourselves is the "right to work", as we understand it: namely, freedom of contract in employment. And the constitutional provision upon which we shall focus is the article which guarantees a nationwide "right to work": namely, the Thirteenth Amendment.

A. Freedom of contract is perhaps the most pervasive of all the constitutional principles which secure autonomy and independence to the individual.

It is fashionable in some quarters to deride the principle of "freedom of contract" as an "abstract absolute", an empty and meaningless concept. Nothing could more egregiously distort and defame its position and role in our constitutional jurisprudence.

As a matter of legal categorization in the general case, "freedom" implies as its logical corollary a

disability in government to control or limit individuals in its exercise. On the other hand, as a matter of practical definition in any particular case, freedom involves the actual behavior of individuals characterized by the unique facts of time, place, and manner. All freedoms, then, are abstract in definition, but specific in application. Moreover, in either case, all real freedoms are and must be absolute, in the sense that, within the ambit of a particular freedom, government power is nonexistent. For if the concept "freedom" delimits the concept "governmental power"; and if freedom is not absolute, or capable of fixing and confining the actions of government according to objective standards; then the power of government is unlimited, or totalitarian – a conclusion which contradicts the first principle of our political system.

Operationally, freedom means that there always remains some area in which the individual himself, and not the political process, chooses how he will conduct his own affairs. Not because the political process has not preempted individual choice (for example, by inadvertence), but rather because the political process may not legitimately preempt that choice, even if a majority so wills. To be sure, the content of particular freedoms differs according to the protean nature of time, place, and circumstances. For instance, "freedom of speech" may mean one thing in a person's home, another thing in a public street, and something else again in the proverbial "crowded theatre". But, in any event, the meaning of constitutional – or limited – government is that no set of circumstances can exist under which the political process may rightfully claim that all individual freedoms have no content simultaneously.

In short, to contend in general that freedom as a legal category is not an abstract absolute is to deny the possibility of constitutionalism. And to claim in a particular case that a recognized freedom is not absolute in its own right is to deny the applicability and controlling nature of the Constitution. Either assertion is meritless.

As a generality, "freedom of contract" means that individuals among themselves may make arrangements which courts will enforce according to common-law principles, without the intervention of the political branches of government. (The enforceability of these arrangements through judicial process distinguishes freedom of contract from freedom of association, although evidently there are cases where the two are identical.) Freedom of contract thus permits individuals to order and regulate their own lives without majoritarian interference – in other words, to govern themselves. Freedom of contract and self-government are two sides of the same coin.

As applied, freedom of contract is always freedom of contract in respect of some specified activity, such as freedom of contract to speak on public issues by purchasing space in a newspaper; or freedom of contract to associate with others in a lawful private organization; or, as in this case, freedom of contract to seek employment in a state other than the state of one's citizenship. In any particular case, then, reference to constitutional principles other than freedom of contract is usually necessary to define the substantive conduct in which individuals may engage with self-determination and independence of the political process. For example, the First Amendment protects

freedom of speech explicitly, guarantees freedom of association implicitly, and says nothing at all about freedom of contract. But the common-law contractual process of offer and acceptance which furthers the exercise of individual First-Amendment liberties partakes derivatively of the same constitutional protection those liberties enjoy: both freedom of contract to speak and freedom of contract to associate are, and must logically be, "preferred" freedoms. In these cases, the First Amendment supplies the content and defines the ambit of freedom of contract. Numerous other examples exist, drawing their inspiration from various constitutional provisions – including the freedom to contract for the purposes of self-defense, guaranteed by the Second Amendment; the freedom to contract for the purposes of securing privacy, guaranteed by the Ninth Amendment; and so on. Here, though, we are concerned with a particular freedom of contract that is not derivative of, but rather inherent in, a constitutional right: namely, the freedom to contract for employment, the freedom which is the primary subject of the Thirteenth Amendment. The absence of "slavery", as the Thirteenth Amendment. understands that term, is the presence of the freedom to offer and accept contracts of employment on the basis of legal equality among all qualified individuals.

Before turning to constitutional exegesis, however, we should emphasize that, *pace* the Alaska Court, the character of the freedom to contract for employment (the "right to work") is *not* such as "unduly [to] constrict the legislature's ability to respond to perceived public needs, without any corresponding benefit to personal liberty or the public good". Jurisdictional Statement at 13a (footnote omitted). Freedom of

contract in employment does not preclude government, as an employer, from establishing rational, work-related qualifications with respect to its own employees' hire, tenure, or other terms and conditions of employment. Neither does it preclude government, where the latter possesses constitutional authority to supervise or regulate private employers, from imposing rational, work-related limits on how they deal with their employees. Nor does it preclude government, in appropriate circumstances, from requiring those practicing a profession to meet and maintain minimum levels of competence or character in serving the public. Freedom of contract in employment poses no obstacle to governmental action in these cases because that freedom itself implies a constitutional privilege to contract only for that employment for which an individual qualifies in terms of rational, work-related criteria and standards. The creation and enforcement of these criteria and standards by government, as an employer or as the regulator of other employers or self-employed persons, thus cannot interfere with freedom of contract in employment, by hypothesis. And, in such circumstances, no more is necessary than that any limits on employment freedom be rationally work-related in fact. *E.g., Board of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976).

Conversely, absent a real and substantial connexion in fact between a governmental regulation of contracts for employment and the peculiar technical requirements of that employment, any such regulation is unconstitutional *per se* – because it necessarily constitutes a "badge and incident of slavery", outlawed without exception by the Thirteenth Amendment.

B. The Thirteenth Amendment specifically guarantees an equal freedom of contract in employment to everyone in the United States.

This appeal does not raise a Thirteenth-Amendment issue directly. However, the holding of the Supreme Court of Alaska that Alaska Hire is consistent with the Equal Protection Clause of the Fourteenth Amendment indirectly implicates the antislavery provision. The Alaska Court ruled that the freedom to contract for employment (the "right to work") is not a "fundamental" right, and that the discrimination between Alaska citizens and citizens of other states worked by Alaska Hire is therefore permissible, since it purportedly serves a rational state interest in promoting the local economy. That this conclusion is erroneous on mere Fourteenth-Amendment grounds seems clear. *Truax v. Raich*, 239 U.S. 33, 41-42 (1915). But, even more convincingly, study of constitutional history proves beyond debate that the freedom to contract for employment is as fundamental a personal liberty as the Constitution recognizes, and that the Thirteenth Amendment secures an absolute legal equality in the exercise and enjoyment of that freedom for all persons in the United States.

This Court has but infrequently applied the Thirteenth Amendment. However, on those few occasions the Court has given its language a construction as liberal as its purpose is important. The Amendment, representative opinions make clear, extends its protection to every individual, its "plain intention" being "to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free". *Bailey v. Alabama*, 219

U.S. 219, 241 (1911); *Hodges v. United States*, 203 U.S. 1, 16-17 (1906); *Civil Rights Cases*, 109 U.S. 3, 20, 33 (1883) (opinion of the Court; Harlan J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

The legislative history of the Thirteenth Amendment and of the civil-rights statutes which Congress enacted pursuant to it immediately after the Civil War confirms this broad interpretation. From 1864 to 1866, Congress confronted the practical problem of eradicating negro chattel slavery in the United States. During the opening days of the Thirty-ninth Congress, members introduced a number of bills and resolutions on the slavery issue. *Cong. Globe*, 39th Cong., 1st Sess. 39, 46, 69, 91-92 (1865). Congress enacted none of the proposals – not because of their ultimate goals, on which there was general agreement, but because the congressional majority adjudged them too narrow in scope to achieve the wider purpose of Congress, and because majority leaders had decided to postpone action until after adoption of the Thirteenth Amendment so that "legislation on this subject [might] be general throughout the United States". The proposed bills and resolutions had evinced a common concern for equal protection of the law and for the preservation of each individual's fundamental rights; but they did "not go far enough". *Id.* at 41, 43 (Senators Sherman and Trumbull).

During the debates on the Thirteenth Amendment, its spokesmen had been emphatic that "[e]very vestige of slavery in the entire country must be removed". To congressional leaders such as Representative Ignatius Donnelly, there could be "no safety for this nation so

long as a spark of vitality remains in the institution of slavery" – which counseled "the destruction of slavery, its utter and absolute destruction". For them, said Senator Henry Wilson, the Thirteenth Amendment was necessary to and would "obliterate the last lingering vestiges of the slave system", "all it was and is, everything connected with it or pertaining to it". Therefore, it was hardly unnatural for Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and a decisive moving force behind the Thirteenth Amendment, to argue that "when the constitutional amendment is adopted * * * we may pass a bill * * * that will be * * * sweeping and efficient". For he was perhaps foremost among those who believed that "[w]ith the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support. Let them all be abolished" – "not only * * * in name, but in fact". *Id.*, 38th Cong., 1st Sess. 1246 (Representative Beaman), 2037, 2038, 1324 (1864); *id.*, 39th Cong., 1st Sess. 43, 323 (1865-1866).

Senator John Sherman also pointed out that effective legislation should be couched in "definite", "distinct", and "clear" language, "naming and detailing precisely the rights that * * * shall be secured", in order that "there shall be hereafter no dispute or controversy". *Id.* at 42.

1. The Thirteenth Amendment guarantees the freedom to contract for employment in order to eradicate the primary badge and incident of slavery.

When they undertook to name and detail precisely a set of fundamental personal liberties, the framers of the Thirteenth Amendment were well aware that slavery is not necessarily confined in practice to any precise condition. As Representative Donnelly noted,

> [e]very country tolerating slavery has affixed to it conditions peculiar to itself. * * * A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor as fully as if deprived of all; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled; he may be oppressed by a convocation of masters called a Legislature as fully as by a single master.

Id. at 588. Because slavery may exist, then, not only in outright bondage but also in more subtle deprivations of fundamental freedom, the framers of the Amendment were careful, in its second section, to authorize Congress to determine what are its "badges and incidents" and to provide effective legislation to eradicate them completely. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968); *see Blyew v. United States*, 80 U.S. (13 Wall.) 581, 601 (1872) (Bradley, J., dissenting).

Two early and important pieces of such legislation were the Civil Rights and Freedmen's Bureau Bills.[1] In most instances, comments on the purpose and effect of the Civil Rights Bill, especially, reflected the views of the post-Civil-War Congress on the scope of the Thirteenth Amendment. For Congress intended the Civil Rights Bill "to give effect to" and to create "a power enforcing the language of the Constitution, guarantying all the rights which th[e Thirteenth A]mendment gives". Senator Trumbull, for one, described the relationship as one of means and ends. To him, the Civil Rights Bill secured "to all persons within the United States practical freedom". The particular freedoms guaranteed by the bill were "appropriate" means to safeguard the general individual liberty decreed by the abolition of slavery. *Cong. Globe*, 39th Cong., 1st Sess. 602 (Senator Lane), 1805 (Senator Doolittle), 474 (1866).

Those who opposed passage of the Freedmen's Bureau and Civil Rights Bills argued that the Thirteenth Amendment merely dissolved the legal bond which held the negro slave to his master as a form of property. *E.g., id.* at 113, 318, 476, 499, 576, 600-01, 623, 628, 1268, 1784. Such claims were highly inconsistent –

---

[1] Congress enacted the Civil Rights Bill over the veto of President Andrew Johnson as the Civil Rights Act of 1866, Act of 9 April 1866, ch. 31, §1, 14 Stat. 27, *re-enacted by* §18 of the Enforcement Act of 1870, Act of 31 May 1870, ch. 114, §18, 16 Stat. 140, 144, *and codified in* §§1977-78 of the Revised Statutes of 1874, *now* 42 U.S.C. §§1981-82 (1970). Its purpose was to extend the basic protections of the Freedmen's Bureau legislation to the entire country. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 424 n.31 (1968).

coming as they did from men who had earlier opposed enactment of the Amendment on the very ground that it would give Congress virtually unlimited authority to enact laws for the protection of civil liberties in every state. *Id.*, 38th Cong., 1st Sess. 1364-67, 2615-18, 2940-43, 2945-47, 2960-62, 2982-88 (1864); *id.*, 38th Cong., 2d Sess. 178-83, 193-95, 238-41, 480-81, 528-30 (1864-1865). And they were specifically refuted by the congressional majority.

In the debates of 1864, for example, Senator Daniel Clark carefully defined the "essential difference between the emancipation of slaves and the abolition of slavery". He explained that the former "concerned the persons of slaves" and "rescued some of [the] victims [of slavery]", while the latter "is of wider scope and more searching operation" – designed not only to free the men then in bondage, but also to "mak[e] slavery impossible" in the future. In the debates of 1866, the congressional majority was equally explicit concerning the far-reaching authority granted by the Thirteenth Amendment. "[I]ts effect", said Senator James Guthrie, "is to work the complete freedom of every individual, and to break down every provision in the Constitution and laws of the United States and of the several States which prevents the enjoyment of that freedom". Moreover, the Amendment strikes down not only laws directly supporting slavery, but also, as Senator Wilson made clear, all "laws tending to the same end". *Id.*, 38th Cong., 1st Sess. 1369 (1864); *id.*, 39th Cong., 1st Sess. 335, 340 (1866).

Representative Donnelly, therefore, was not engaging in congressional hyperbole when he enjoined his

colleagues that, "having prohibited slavery, we must not pause for an instant until the spirit of slavery is extinct, and every trace left by it in our laws is obliterated". For, as Senator Trumbull argued, the object of the Thirteenth Amendment is not simply the destruction of slavery but "the destruction of the incidents to slavery" as well, all those "badges of servitude made in the interest of slavery and as a part of slavery". Similarly, Representative Thayer described the purpose of the Amendment as the eradication of "all the oppressive incidents of slavery", "all the concomitants, all the disabilities, and all the tyrannical restrictions which grow out of and were a part of th[e] condition of slavery". Its "practical effect", he observed, "is to declare not only that slavery shall be abolished upon the pages of [the] Constitution, but that it shall be abolished in fact and in deed", "abolished and destroyed forever". *Id.* at 585, 322, 1152.

In short, "[t]he Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery * * *, but it prevents the impositions of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting); *see Cong. Globe*, 39th Cong., 1st Sess. 77 (1865) (Senator Trumbull).

Both Congress and the courts have explicitly and repeatedly recognized as foremost among the badges and incidents of slavery two related deprivations of fundamental freedom: (i) the disability to make employment contracts; and (ii) the absence of right to

hold as personal property for the employee's own use and benefit the wages derived from the employment relation. As this Court emphasized in the *Civil Rights Cases*, the absence of right to hold property derived from labor, the disability to make employment contracts, "and such like burdens and incapacities" were the preëminently "necessary" and "inseparable incidents of the institution" of slavery which the post-Civil-War Congress intended to extirpate by means of the Thirteenth Amendment and its legislative progeny. 109 U.S. 3, 22 (1883); *accord, Hodges v. United States*, 203 U.S. 1, 31, 35 (1906) (Harlan, J., dissenting), *overruled and dissent adopted in Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-37 (1968). And indeed, unless the Thirteenth Amendment did guarantee to all citizens an equal freedom to enter into and to benefit fully from employment contracts, its promise to abolish every vestige of slavery and to work its utter and absolute destruction would be essentially unavailing. For the disability to contract for employment was the "inflexible rule of * * * slavery, wherever it existed". *Hall v. United States*, 92 U.S. 27, 30 (1876); *see, e.g., Anderson v. Poindexter*, 6 Ohio St. 622 (1857); *State v. Van Lear*, 5 Md. 91 (1853); *Gist v. Toohey*, 2 Rich. 424 (S.C. 1846); T. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America*, 246 (1858). In abolishing the "peculiar institution", then, the Thirteenth Amendment necessarily made absolute the equal freedom of all individuals to contract for employment.

So the legislative history demonstrates. Even before the states had ratified the Amendment, Senator Trumbull began to identify those fundamental personal

liberties which its guarantee addresses. Men are not free, he asserted, without the privileges "to go and come when they please, to buy and sell when they please, [and] to make contracts and enforce contracts * * *. These are [the] rights which the first clause of the constitutional amendment meant to secure to all". *Cong. Globe*, 39th Cong., 1st Sess. 43 (1865). Later, Trumbull introduced the Freedmen's Bureau and Civil Rights Bills, both of which proceeded on the theory that effective implementation of the Thirteenth Amendment required Congress to identify specific "civil rights and immunities", and to provide protection for these freedoms. Accordingly, section 1 of the Civil Rights Bill and section 7 of the Freedmen's Bureau Bill contained an identical list of rights, including "the right to make and enforce contracts" and to "purchase, lease, sell, hold and convey * * * personal property". *Id.* at 1151 (Representative Thayer), 476 (Senator Trumbull).

The whole congressional majority agreed that "the civil rights belonging to * * * every American citizen", those "fundamental rights and immunities which are common to the humblest citizen of every free State", include the freedom to make and enforce employment contracts and to hold personal property derived from labor. Senator Trumbull, for example, defined "civil rights, fundamental rights belonging to every man as a free man" in those very terms. He consistently argued that, since the essence of individual freedom is the unrestricted power and privilege to make employment contracts, the Thirteenth Amendment imposes a duty on the federal government to strike down all state and local laws interfering with contractual self-determination. "It is idle to say that a man is free * * * who

cannot * * * make contracts and enforce contracts", he emphasized. To like effect, Representative Thayer questioned the practical value of the Thirteenth Amendment if government were permitted to enact "laws which impair [individuals'] ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts". "What kind of freedom is that", Thayer asked, "under which a man * * * may be deprived of the ability to make a contract" and "of the liberty to engage in the ordinary pursuits of civilized life * * *?" And Representative Burton C. Cook expressed disbelief that "the rights of free men" could be protected "except by securing to them the right to make and enforce contracts". "It is idle", remarked Representative William Lawrence, "to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live", or "the right to make a contract to secure the privilege and the rewards of labor". *Id.* at 476, 322, 43, 1151, 1152, 1124, 1833.

In sum, the legislative history demonstrates that the Thirteenth Amendment recognizes the freedom to contract for employment as a fundamental personal liberty.

2. The Thirteenth Amendment secures equal protection in the exercise and enjoyment of the freedom to contract for employment.

The Thirteenth Amendment is also vitally concerned with legal equality in the exercise and enjoyment of this freedom. The concept of equal protection of the

law was a major topic of congressional debate immediately prior to the ratification of the Amendment. "[E]quality of rights", "equal before the law", "personal freedom without distinction", and like phrases recur again and again throughout the legislative history. The principle that "all men [are] free and equal", said Representative Josiah Grinnell, is "the cornerstone of [the United States], and * * * above all constitutions and all laws". Concurring in this judgment, Representative Godlove S. Orth argued that "[t]he effect of [the Thirteenth A]mendment will be * * * a practical application of the self-evident truth, 'that all men are created equal' ". Representative Thomas T. Davis also asserted that "[n]ature made all men free, and entitled them to equal rights before the law" – and that Congress designed the Thirteenth Amendment to "asser[t] this principle of legal or civil equality". *Id.*, 38th Cong., 1st Sess. 2614 (1864) (Representative Morris); *id.*, 38th Cong., 2d Sess. 155 (Representative Davis), 143 (Representative Orth), 199, 142, 154 (1865).

The congressional majority also made clear that it did not intend to confine this principle of legal equality to the protection of the black race alone. As Representative Nathanial B. Smithers noted, throughout history slavery unquestionably "had its origin in force. It claims no natural sanction for its existence, nor in its operation is it confined to any race. The white man equally with the black has been the subject of its oppressive jurisdiction". And Representative John A. Kasson emphasized that the Thirteenth Amendment would completely eradicate the institution that "[t]ake[s] away * * * fundamental rights from any large class of human beings". *Id.* at 216, 193.

Opponents of the Thirteenth Amendment also asserted – albeit with trepidation – that it would guarantee a basic minimum of personal freedom and legal equality. Repeatedly, the congressional minority denounced the Amendment because it would make all men equal before the law. Its effect, they feared, would be unequivocally to deny what they considered "the right of the States * * * to fix each for itself the status * * * of all * * * people who dwell within their borders". *Id.*, 38th Cong., 1st Sess. 2616 (1864) (Representative Herrick).

Later, in the Senate debates on the Freedmen's Bureau and Civil Rights Bills, Senator Trumbull explained that, although it is difficult "to define accurately what slavery is and what liberty is", "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited". Under the Thirteenth Amendment, Trumbull asserted, the federal government "may destroy all these discriminations in civil rights", since otherwise the Amendment would "amoun[t] to nothing". On the basis of this authority, he described the Civil Rights Bill as "declar[ing] that in civil rights there shall be an equality among all classes of citizens". And he made clear that Congress intended no narrow equality drawn exclusively along racial lines. The Bill, said Trumbull, "applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights". Neither was the congressional commitment to equality to be undertaken with half-measures. "[A]t all hazards and

under all circumstances", Trumbull declared, "there shall be impartiality among all classes in civil rights throughout the land". "[W]e demand", concurred Senator Wilson, "that by irreversible guarantees no portion of the population of the country shall be degraded" – that all shall receive "protection by equal laws". *Id.*, 39th Cong., 1st Sess. 474, 322, 1760, 599, 322, 340, 343 (1866).

Similarly in the House debates, the congressional majority referred repeatedly to the broad equal-protection basis of the Thirteenth Amendment in support of civil-rights legislation. Representative Cook stated the basic proposition: "when [fundamental civil] rights * * * are denied to any class of men * * *, when they are subject to a system * * * which operates upon them as upon no other part of the community, they are not secured in the rights of freedom". In agreement, Representative Thomas D. Eliot argued that "the citizen must be endowed with all the rights which other men possess". And Representative Donnelly urged Congress to "make all the citizens of the country equal before the law", "to break down all walls of caste", and to "offer equal opportunities to all men". *Id.* at 1124, 513, 589.

In one of the most important arguments presented in the legislative debates, Representative William Lawrence made explicit the views of the congressional majority that the freedom secured by the Thirteenth Amendment is not merely the absence of chattel slavery. Rather, it is, on the one hand, a promise to each individual of equality with all other individuals as to those legal relations which government is competent to create, alter, or destroy; and, on the other, a guarantee

of certain immutable civil rights and immunities defining the personal liberty which government is charged to recognize and protect. As Lawrence said, the Thirteenth Amendment imposes upon the legislative authority of every government

> the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.
>
> * * * * *
>
> There is in this country no such thing as "legislative omnipotence." [State constitutions do not confer authority] to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men. * * * This has been the common understanding in our whole history, and upon which governments have been created.
>
> * * * * *
>
> It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.
>
> * * * [T]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.
>
> * * * * *
>
> Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.

> If the people of a State should become hostile to a large class of * * * citizens and should enact laws to prohibit them and no other citizens from making contracts, from * * * holding * * * property, * * * that would be prohibitory legislation. If the State should * * * enact laws for [one class of citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, * * * that would be a denial of justice.

Lawrence recognized that, "so far as there is any power in the states to limit, enlarge, or declare civil rights", the Thirteenth Amendment does not interfere with its exercise, provided that government affords all citizens an equal opportunity to enjoy such rights as it chooses to declare. But, if not, its action (as Senator Trumbull had earlier observed), constitutes "an unjust encroachment upon [individual] liberty" and "a badge of servitude which, by the Constitution, is prohibited". *Id.* at 1832-33, 474.

The dissenting opinion of Justice Field in the *Slaughter-House Cases* early reflected this understanding of the Thirteenth Amendment. Recognizing (as did the majority) that the Amendment "is general and universal in its application", Field construed the broad proscription as intended not only to abolish "slavery in the strict sense of the term", but also "to make every one born in this country a freeman", and to invalidate any law which "makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others". 83 U.S. (16 Wall.) 36, 90-91 (1873) (approving argument of counsel). Almost a century later, this Court adopted identical reasoning to hold in

Griffin v. Breckenridge that the Thirteenth Amendment can serve as a source of constitutional power for Congress to reach a conspiracy based on an invidiously discriminatory animus to deprive individuals of equal protection of the laws. 403 U.S. 88, 102-05 (1971).[2]

In sum, the legislative history proves that equal protection in the exercise and enjoyment of the freedom to contract for employment is one of the fundamental guarantees of the Thirteenth Amendment.

II.

Article IV, §2 denies a state any power to discriminate in favor of its own citizens with respect to the freedom to contract for employment in the common callings of interstate commerce.

That the Thirteenth Amendment establishes the freedom to contract for employment on the basis of legal equality with all other individuals as a fundamental personal liberty does not end our inquiry, however. For the Appellants did not raise that Amendment in the courts below. Nevertheless, their reliance instead upon Article IV, §2 does not foreclose application of Thirteenth-Amendment principles – since that Article includes freedom of contract in employ-

[2] *Griffin* involved racial discrimination; but the Court left open the possibility that other forms of invidious, class-based discrimination were actionable. 403 U.S. at 102 & n.9. At least one such invidious discrimination is recognized in Article IV, §2 – namely, that against citizens of other states.

ment among the "privileges" it secures; and absolutely guarantees that freedom where the "common callings" of interstate commerce are concerned.

A. Freedom of contract in employment is among the privileges which Article IV, §2 secures against state discrimination.

Article IV, §2 does not enumerate the "privileges and immunities" it guarantees. But both constitutional history and judicial precedent teach that freedom of contract in employment is among them.

First, Article IV, §2 derives in both purpose and phraseology from Article IV of the Articles of Confederation. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873). And the latter article specifically provided that "the people of each state * * * shall enjoy [in any other state] all the privileges of trade and commerce" which "the inhabitants" of the other state enjoyed. Now, necessary to the very existence of trade and commerce in a market system is the legal privilege to offer and accept contracts of employment. Commerce, after all, is primarily a matter of common-law contract; and employment is central to the processes of production and distribution which constitute commerce. Therefore, Article IV, §2 logically denies each state any power to discriminate against citizens of any other state with respect to those citizens' freedom to contract for employment in trade and commerce – "[t]he better", the Articles of Confederation explained, "to secure and perpetuate * * * intercourse among the people of the different states". *Cf. Gibbons v. Ogden*, 22 U.S. (9

Wheat.) 1, 189-92 (1824) ("commerce" means "intercourse" among the peoples of the several states).

Second, the framers of the Fourteenth Amendment designed its Privileges and Immunities Clause precisely to guarantee to all citizens the fundamental liberties which the southern states had claimed a sovereign power to withhold from negroes and other "inferior" classes prior to the Civil War. W.W. Crosskey, *Politics and the Constitution in the History of the United States*, 1083-97, 1119-34 (1953). And recurrently in the debates on the Thirteenth and Fourteenth Amendments, congressional spokesmen identified Article IV, §2 as a repository of the same basic freedoms which they intended the new Amendments and their statutory progeny to embody and enforce. *E.g., Cong. Globe*, 38th Cong., 2d Sess. 193 (1865) (Representative Kasson); *id.*, 39th Cong., 1st Sess. 319, 474-75, 600 (Senator Trumbull), 704 (Senator Howard), 1034 (Representative Bingham), 2765 (Senator Howard), 3035 (Senator Henderson), 3035 (Senator McDougall). The Privileges and Immunities Clause of the Fourteenth Amendment embraces *inter alia* all those individual freedoms which owe their existence, in the sense of legal recognition, to the Constitution – not the least of which are the liberties the Thirteenth Amendment protects. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873). Therefore, Article IV, §2 logically embraces the same privileges and immunities, or, in this case, the freedom to contract for employment on the basis of legal equality with all other citizens.

Third, this Court has repeatedly held, at least implicitly, that Article IV, §2 guarantees an equal freedom of contract in employment. Immediately after

the Civil War, the Court ruled on two occasions that that Article protects citizens engaging "in lawful commerce, trade, or business" and "in the acquisition and enjoyment of property" from invidious discrimination. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). More recently, the Court again held that "doing business" and the "common callings" are within the purview of the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385, 396, 403 (1948). As far as wage-earners are concerned, though, commerce, trade, business, the common callings, and even the acquisition of property are peculiarly the subject-matter of employment contracts. Therefore, if Article IV, §2 guarantees employees substantial equality in the practice of the common callings and in the acquisition of property derived from that practice, it logically must also protect the primary means by which employees and their employers order their mutual relationships – namely, freedom of contract in employment.

B. A state may not grant a monopoly of employment to its own citizens where that employment involves interstate commerce.

Its source in the Thirteenth Amendment implies that the freedom to contract for employment on the basis of legal equality with all other individuals, rightly understood, is not subject to any exceptions or conditions, even if its mechanism of enforcement involves Article IV, §2. The Supreme Court of Alaska, however, purported to find just such an "exception" in

the notion that, under Article IV, §2, "a state may prefer its own residents in dealing with natural resources it owns". Jurisdictional Statement at 19a. Under the circumstances of this case, no such "exception" is applicable, for two reasons.

First, Article IV, §2 grants no general permission for the states to establish commercial monopolies on behalf of their citizens. *Toomer v. Witsell*, 334 U.S. 385, 395-99 (1948). And that is true even if the subject of the monopoly is resources or employment opportunities adventitiously found within the state. *Id.* at 402-03; *see also Truax v. Raich*, 239 U.S. 33, 41-42 (1915).

Second, the so-called "natural-resources exception" to Article IV, §2 is not an exception to that provision at all, but instead refers to a situation not within the ken of the Article in any event. The Constitution imposes no duty on a state to allow *its* resources – that is, resources the legal title to which resides in the citizens of the state as a sovereign body – to move in interstate commerce. There is no constitutional duty to sell what one owns, whether the owner be a private citizen or a sovereign state. But if a state may constitutionally eschew commerce in the resources it owns between itself and citizens of other states, then only citizens of the owner-state can ever participate in ownership of those resources; and citizens of other states can never acquire any proprietary interest in the resources, by contract or otherwise. In this situation, there is and can be no discrimination constitutionally cognizable under Article IV, §2 where the state outlaws contracts for interstate transfer of such resources, because citizens of one state have no general "privilege" to share or participate in the ownership of property

belonging exclusively to citizens of another state, if the latter citizens decide as a sovereign body to reserve for themselves the use and benefit of their common property. The Constitution does not require any state to make a contract with the citizens of any other state for the sale or transfer of resources it owns and which it desires to retain within its borders. Neither does it disable any state from denying its citizens a privilege themselves to alienate to noncitizens any portion of those resources. *Geer v. Connecticut*, 161 U.S. 519, 529-32 (1896); *McCready v. Virginia*, 94 U.S. 391, 395-96 (1877).

Similarly, a state may refuse to hire citizens of another state as public employees, without offending Article IV, §2. Public employees, after all, themselves exercise or serve as the vehicle through which the people exercise some portion of the sovereign authority of a state. And the privilege to participate directly or indirectly in the exercise of a state's sovereignty is not one which the Constitution grants to noncitizens. The situation might be different if the operations of a state's government were an aspect of interstate commerce. But nothing is more obvious than that "government" is not "commerce" in the constitutional sense of those terms. *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

In short, the "natural-resources", "ownership", or "sovereignty" theories permit a state to discriminate between its citizens and citizens of other states precisely because the latter citizens have no rationally defensible constitutional privilege to acquire a proprietary interest in the state's resources or to participate directly or indirectly in the exercise of its sovereignty.

Therefore, in such situations, Article IV, §2 is inapplicable by hypothesis. However, where (as here) a state specifically exploits its resources for and directs them into the stream of interstate commerce, and creates employment opportunities inextricably connected with the preparation of those resources for and their delivery to or transportation in interstate commerce, the "ownership" theory is no longer relevant. All citizens, of every state, have an equal constitutional privilege to participate in interstate commerce. And once a state's resources or jobs related thereto become a part of interstate commerce, the state must eschew any discrimination between its citizens and those of other states which lacks a real and substantial basis in some *bona fide* occupational qualification. Article IV, §2 applies in such a case because the state, by permitting the resources it owns to flow into interstate commerce, has itself recognized the claim of citizens of all other states, under the Commerce Clause, to participate in a national market for those resources and the employment opportunities their exploitation creates. *See Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11-13 (1928). In such a case, the state has no more power to discriminate against citizens of other states than it would if it attempted to stifle interstate commerce in property it does not own. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 595-600 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 250-60 (1911).

III.

A state which discriminates in favor of its own citizens with respect to freedom of contract in employment frustrates operation of the national labor market which the Commerce Clause established and protects.

The Supreme Court of Alaska opined that the Appellants did not properly raise issues arising under the Commerce Clause in the courts below. Jurisdictional Statement at 18a. We have seen, however, that there is an inextricable connexion in this case among Article IV, §2, the Thirteenth Amendment, and the Commerce Clause. Article IV, §2 prohibits a state from discriminating against citizens of other states with regard to certain privileges and immunities. The Thirteenth Amendment is the source of one of these privileges: namely, the freedom to contract for employment on the basis of legal equality with all other individuals. And the Commerce Clause defines another closely related liberty: namely, the privilege of each person to participate in a national labor market unhampered by local restrictionism or protectionism.

A. A state may not impede the free flow of labor in interstate commerce in order to benefit its own economy.

The grant of power to Congress in the Commerce Clause is unaccompanied by any explicit limitation on the powers of the states over commercial matters. This Court early held, however, that the Clause impliedly

denies the states any authority to impose burdens on interstate commerce where the subject-matter on which they intend their laws to operate is national in character and requires uniformity of regulation. *E.g., Leisy v. Hardin*, 135 U.S. 100, 119-20 (1890). The major principles of this judicial doctrine are so well known as to render their restatement here supererogatory. *See, e.g., Southern Pacific Co. v. Arizona* ex rel. *Sullivan*, 325 U.S. 761, 766-70 (1945). But three points deserve special emphasis.

First, interstate commerce is not merely transportation. Rather, it includes all the "components parts" and "essential elements" of commercial intercourse among the states. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

Second, one of these "essential elements" is a national labor market which presupposes competition among the citizens of different states for employment in those trades and industries that serve the needs of interstate commerce. *E.g., H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 531-39 (1949).

Third, a state may not justify its interference with the free functioning of the national labor market by simplistic appeals to "conservation", to the "economic welfare" of its citizens, or even to the real social and economic burdens of unemployment. *Id.* at 538; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *Edwards v. California*, 314 U.S. 160, 173-76 (1941). That a particular state's economy may benefit peculiarly from a restriction on interstate commerce, at the expense of the nation as a whole, is a compelling reason for disallowing, not for approbating, the state's action.

B. A violation of Article IV, §2 with respect to freedom of contract in employment constitutes a burden on commerce.

Where freedom of contract in employment is concerned, Article IV, §2 supports the same conclusion. On the one hand, the Thirteenth Amendment guarantees all individuals legal equality to contract for employment; and that liberty is one of the privileges of national citizenship which every state must respect. *Supra* pp. 9-27. On the other hand, the essence of commerce is the formation of market prices which permit rational economic calculation to direct economic activity; for, without prices established through the market mechanism of entrepreneurial buying and selling, commerce ceases, and the production of goods and services become governmental and bureaucratic in character. L. von Mises, *Bureaucracy* (1944); T. Hoff, *Economic Calculation in the Socialist Society* (1949). Therefore, commerce, in so far as it involves labor, is identical with freedom of contract in employment. And discrimination by a state against citizens of other states with respect to that freedom is simultaneously a violation of Article IV, §2 and of the Commerce Clause.

That commerce and freedom of contract in employment are two manifestations of the same process, this Court has long recognized. Production for commerce is a part of commerce. *E.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-41 (1937). And buying and selling for the purpose of commerce is no less a part of commerce. *E.g., Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 & n.2 (1925). Therefore, buying and

selling labor services through the exercise of contractual freedom, an essential element of production for commerce, is itself commerce. This Court has held in numerous preëmption cases that the states have no power to control the content of labor contracts in the face of a contrary command from Congress under the Commerce Clause. *E.g., Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956). The same principle teaches that the states have no power to discriminate against each others' citizens in terms of contractual freedom where the Thirteenth Amendment and Article IV, §2 together mandate a contrary policy.

The mutually reinforcing relationship between Article IV, §2 and the Commerce Clause has been the subject of this Court's decisions in the past. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430-31 (1871). And, at times, it has led to spirited debates among the Court's members over which provision should control a particular case. *E.g., compare Edwards v. California*, 314 U.S. 160, 177 (1941), *with id.* at 177-81 (Douglas, J., concurring), *and id.* at 181-84 (Jackson, J., concurring). Where freedom of contract in employment is concerned, however, no extended discussion or debate is necessary. Freedom of contract in employment is both a privilege within the ken of Article IV, §2 and the essential element of commerce in human labor among the states. To abridge that freedom in violation of Article IV, §2 is and must be to burden commerce in violation of Article I, §8.

Here, then, is a striking example of the symmetry and coherence of the Constitution – which, in the Thirteenth Amendment, guarantees the "right to work" to all persons within the United States; which, in the

Commerce Clause, establishes a nationwide market free from the parochial protectionism of the states; and which, in Article IV, §2 denies the states any power to frustrate the primary means by which individuals participate as free men and women in the national labor market.

IV.

Because it denies freedom of contract in employment and frustrates operation of the national labor market, Alaska Hire is repugnant *per se* to the Equal Protection Clause of the Fourteenth Amendment and to Article IV, §2.

We have demonstrated that Alaska Hire deprives citizens of states other than Alaska who desire to seek employment in that state's oil industry of both (i) their freedom to contract for employment on an equal legal basis with Alaska citizens, in violation of the Thirteenth Amendment; and (ii) their privilege to compete in a free and open national labor market, in violation of the Commerce Clause. These deprivations of basic individual liberties come within the ambit of the two constitutional provisions which the Appellants raised in the courts below.

A. Alaska Hire discriminatorily limits freedom of contract in employment on a basis not rationally related to *bona fide* work qualifications, contrary to the Equal Protection Clause of the Fourteenth Amendment.

No one denies that Alaska Hire discriminates, and is meant to discriminate, between Alaska citizens and citizens of other states with respect to freedom of contract in employment.[3] The Supreme Court of Alaska merely held that this discrimination is constitutional, because the freedom to contract for employment (the "right to work") is not, in its view, a "fundamental" right. We have already proven that that view is in error. Study of the legislative history of the Thirteenth Amendment and civil-rights legislation enacted pursuant to it establishes that that Amendment guarantees all individuals an absolute equality of legal privilege to offer and accept contracts for employment in whatever trade or profession they are qualified to follow or practice. The Equal Protection Clause of the Fourteenth Amendment can do no less.

To be sure, if Alaska Hire discriminated only on the basis of *bona fide* work qualifications, it would not

---

[3] Alaska Hire discriminates in favor of Alaska "residents", not "citizens". But the term "resident", as defined, imports citizenship, not merely place of abode. *See* Alas. Stat. §§38.40.090(3) ("resident" means a person who "has established a residency for voting purposes within the state"), 38.40.090(5) ("resident" means a person who "shows by all attending circumstances that his intent is to make Alaska his permanent residence"). In the absence of disagreement by the Alaska courts, this is enough to bring Article IV, §2 into play. *Contrast* La Tourette v. McMaster, 248 U.S. 465, 469-70 (1919).

offend the Thirteenth or Fourteenth Amendments. But the law has nothing to do with such qualifications. Neither the statute itself nor the opinion of the Alaska Court advances the incredible proposition that all Alaska citizens are more qualified to work in that state's oil industry than are citizens of other states. Indeed, the law itself refutes any such presumption, since it expressly permits "casual or intermittent", and even "emergency", employment of citizens from other states. Alas. Stat. §35.020(b, c). Moreover, neither the statute itself nor the opinion of the Alaska Court suggests that the goal or result of Alaska Hire is or will be to establish or enforce special state-mandated work qualifications. Rather, the law expressly leaves the question of a prospective employee's qualification for employment to the employer, according to "the reasonable standards of the industry". Alas. Stat. §§35.090(12), 38.40.060(b).

In sum, the true purpose and effect of Alaska Hire is to monopolize certain employment opportunities in interstate commerce for Alaska citizens. And so the Alaska Legislature candidly admits. Alas. Stat. §§38.40.010, 38.40.020, 38.40.030. This purpose, however, is not consistent with the concept of equal protection in the exercise and enjoyment of freedom of contract in employment which the Thirteenth and Fourteenth Amendments embody. Its inconsistency with those Amendments, furthermore, is absolute. There is no conceivable "compelling state interest" which can override legal equality in the freedom to contract for employment. For denial of legal equality in the exercise and enjoyment of that freedom is the preëminent badge and incident of slavery; and, as the

Thirteenth Amendment unequivocally commands, slavery, in any of its manifestations, shall not exist within the United States. The enforcement of that command, and that command only, can provide equal protection of the law in this case.

B. Alaska Hire impedes interstate commerce in labor services, contrary to Article IV, §2.

The Supreme Court of Alaska did not deny that Alaska Hire burdens interstate commerce in labor services. It avoided the issue that burden raises, by ruling that "no commerce clause claim is advanced" against the statute. Jurisdictional Statement at 17a-18a. As we have shown, however, the principle of a national labor market untrammelled by state protectionism and restrictionism is inherent and unavoidable in this case, even though it arises only indirectly under Article IV, §2. And it is the interstate-commerce aspect of the case which vitiates the Alaska Court's sole rationale for Alaska Hire.

The Alaska Court sought "to consider Alaska Hire an economic measure justified by * * * the principle that a state may prefer its residents in dealing with natural resources it owns". Jurisdictional Statement at 19a. That the latter principle may apply to resources the legal title to which is in a state, and which the state intends to withhold completely from interstate commerce, is true; but that it does not apply to resources which a state intends to send or permits to flow into the channels of interstate commerce is equally true, and controlling here. *Supra* pp. 28-30. Alaska Hire is

unconstitutional under Article IV, §2 not, as the Alaska Court suggested, simply because it "make[s] benefits available to citizens of Alaska in preference to citizens of other states", but rather specifically because it denies citizens of other states an equal opportunity to seek employment in Alaska in an industry involved in interstate commerce.

For a discriminatory statute with this effect, there is no "natural-resources exception" to Article IV, §2. Indeed, the very existence of the Commerce Clause and the burden-on-commerce doctrine which this Court has elaborated over the years teaches exactly the opposite. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 595-600 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 250-60 (1911).

CONCLUSION

This Court should reverse the decision of the Supreme Court of Alaska, and declare Alaska Hire repugnant to the Equal Protection Clause of the Fourteenth Amendment and to Article IV, §2.

Respectfully submitted,

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

Attorney for the National Right to Work Legal Defense Foundation

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPELLEES' OBJECTION TO MOTION OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

RONALD W. LORENSEN

OFFICE OF THE ATTORNEY GENERAL
Pouch K, State Capitol
Juneau, Alaska 99811

Washington, D.C. • [illegible] PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPELLEES' OBJECTION TO MOTION OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

STATEMENT OF OBJECTION

The *Motion for Leave to File Brief Amicus Curiae on Behalf of the National Right to Work Legal Defense Foundation, Urging Reversal* was received in the office of the Attorney General for the State of Alaska on January

4, 1978. The undersigned, counsel for appellees, was out of state at the time the *Motion,.etc.* was received and did not learn of it or have an opportunity to review it until January 9, 1978.

Although the undersigned had originally expressed his consent to counsel for the National Right to Work Legal Defense Foundation (hereinafter the "Foundation") to file a brief *amicus curiae* in this case, that consent was based on the assumption that the matters argued in the brief *amicus curiae* would be limited to those issues which had been raised by the parties in this case before the Alaska Supreme Court. It is apparent from even a cursory review of the Foundation's offered brief, however, that the scope of the issues proposed to be raised by it goes far beyond that limitation. Therefore, we feel compelled to object, pursuant to Rule 42.3 of the Rules of the Supreme Court of the United States, to the Foundation's *Motion for Leave to File Brief Amicus Curiae.*

The offered brief of the Foundation raises issues neither raised nor pressed by the appellants in the Court below. These issues include an asserted fundamental right to the "freedom of contract" under the Thirteenth Amendment to the United States Constitution and asserted interference with the free flow of labor in interstate commerce, in violation of the Commerce Clause. The Alaska Supreme Court had not been presented with those issues when it decided this case, 565 P.2d 159 (1977); nor was it presented with a factual record which would have permitted it to do so.*

This Court has made it clear that it will not under-

*For instance, had the issue of Alaska Hire's interfering with interstate commerce been raised at the trial court level, evidence would have been necessary to establish to what extent, if at all, Alaska Hire imposed a burden on a proper subject of interstate commerce.

take to review that which a Court below did not decide. *Walters v. St. Louis,* 347 U.S. 231, 233, 98 L.Ed. 660, 74 S. Ct. 505 (1954). The offered brief of the Foundation proposes that the Court do precisely that, however, and it is for this reason that we object to the Foundation's *Motion for Leave to File Brief Amicus Curiae* and respectfully request that it be denied by this Court. The Foundation must simply wait until a case properly presenting the issues it seeks to raise comes along.

DATED: _____

Respectfully submitted,

By:
/s/ Ronald W. Lorensen
RONALD W. LORENSEN
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL